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CONTENTS

DIPLOMATIC IMMUNITIES—MODERN DEVELOPMENTS BY SIR CECIL J. B. HURST, G.C.M.G., K.C.B., K.C.	1
THE PAN-AMERICAN AND LEAGUE OF NATIONS TREATIES OF ARBITRATION AND CONCILIATION BY SIR JOHN FISCHER WILLIAMS, C.B.E., K.C.	14
INTERNATIONAL LAW AND THE PROPERTY OF ALIENS BY ALEXANDER P. FACHIRI	32
EXTRATERRITORIALITY IN CHINA BY SIR SKINNER TURNER	56
DECISIONS OF MUNICIPAL COURTS AS A SOURCE OF INTERNATIONAL LAW BY H. LAUTERPACHT, LL.D.	65
THE PLACE OF COMMISSIONS OF INQUIRY AND CONCILIATION TREATIES IN THE PEACEFUL SETTLEMENT OF INTERNATIONAL DISPUTES BY CHARLES CHENEY HYDE, A.M., LL.D.	96
THE REVISION CLAUSE IN CERTAIN CHINESE TREATIES BY GEORGE W. KEETON, M.A., LL.M.	111
THE MANDATE FOR PALESTINE BY NORMAN BENTWICH, O.B.E., M.C., M.A.	137
THE CHICAGO DIVERSION BY PROFESSOR H. A. SMITH, M.A.	144
BRITISH POLICY AND THE REGULATION OF EUROPEAN RIVERS OF INTERNATIONAL CONCERN BY RUTH BACON, B.A.	158
INTERNATIONAL POSTAL CONGRESSES BY HARRY RAYMOND TURKEL, M.A.	171
INTERNATIONAL RESPONSIBILITY OF STATES FOR JUDGMENTS OF COURTS AND VERDICTS OF JURIES AMOUNTING TO DENIAL OF JUSTICE BY PROFESSOR J. W. GARNER	181
OBITUARIES:	
VISCOUNT FINLAY OF NAIRN	190
LORD PHILLMORE	197
SIR JOHN PAGET MELLOR	201
DR. H. H. L. BELLOT	204
SIR GEOFFREY BUTLER	206
NOTES:	
Some Implications of the Pact of Paris	208
The United States and the Permanent Court of International Justice	210
The Mandate for Transjordan	212
The State of the City of the Vatican	214
Trusts and Mandates	217
The Channel Tunnel	219
Rules of Evidence in International Proceedings	220

The Calculations of Damages in International Cases	222
The Enforcement of Foreign Judgments	224
Annual Digest of Public International Law Cases	226
General Conventions Prepared at Geneva in 1928	226
DECISIONS, OPINIONS, AND AWARDS OF INTERNATIONAL TRIBUNALS:	
Judgments and Advisory Opinions of the Permanent Court of International Justice	231
DECISIONS OF NATIONAL TRIBUNALS INVOLVING POINTS OF INTERNATIONAL LAW:	
Digest of the Decisions of the English Courts During the Year 1927	244
REVIEWS OF BOOKS:	
<i>Recueil des Cours de l'Académie de Droit International</i>	262
BOSMANS, C. J. E., et VISSER, M.: <i>Répertoire des traités et des engagements internationaux concernant les Pays-Bas</i>	263
BRIERLY, Professor J. L.: <i>The Law of Nations</i>	263
BUTLER, Sir GEOFFREY: <i>The Development of International Law</i>	264
CORBETT, PERCY ELLWOOD, and SMITH, HERBERT ARTHUR: <i>Canada and World Politics</i>	265
DAVIS, MALESHIN W., and MALLORY, WALTER H.: <i>Political Handbook of the World, Parliament, Parties, and Press</i>	267
DEÁK, FRANCIS: <i>The Hungarian-Rumanian Land Dispute</i>	267
EAGLETON, CLYDE: <i>The Responsibility of States in International Law</i>	267
GONSIOROWSKI, MIROSLAS: <i>Société des Nations et Problème de la Paix</i>	268
<i>Transactions of the Grotius Society</i>	270
HIGGINS, Professor PEARCE: <i>Studies in International Law and Relations</i>	271
HUGHES, CHARLES EVANS: <i>The Supreme Court of the United States</i>	272
OPPENHEIM, L.: <i>International Law</i>	273
MASTERSON, WILLIAM E.: <i>Jurisdiction in the Marginal Seas with Special Reference to Smuggling</i>	274
COUVE DE MURVILLE, HENRI: <i>Le Gouverneur dans les Dominions britanniques</i>	277
NIEMEYER, Professor Dr. TH.: <i>Handbuch des Abrüstungsproblems</i>	277
PHILIPSE, A. H.: <i>Le Rôle du Conseil de la Société des Nations dans le Règlement pacifique des différends internationaux</i>	279
PUFENDORF: <i>Classics of International Law</i>	280
RODICK, BURLEIGH CUSHING: <i>The Doctrine of Necessity in International Law</i>	282
ROYSE, M. W.: <i>Aerial Bombardment and the International Regulation of Warfare</i>	283
MAITRI, PHYA KALYAN: <i>Siam Treaties with Foreign Powers</i>	284
SCHÄTZEL, Dr. WALTER: <i>Die elsass-lothringische Staatsangehörigkeitsregelung und das Völkerrecht. Eine rechtsvergleichende Studie der Probleme der Staatsangehörigkeitsregelung bei Gebietsveränderungen</i>	284
STREIT, G.: <i>Der Lausanner Vertrag und der griechisch-türkische Bevölkerungsaustausch</i>	284
Freiherr von TAUBE, Michael: <i>Russland und Westeuropa</i>	284
SECRETAN, JACQUES: <i>Les Immunités diplomatiques des représentants des états Membres et des agents de la Société des Nations</i>	286
SMITH, MUNROE: <i>The Development of European Law</i>	287
TRAVERS, MAURICE: <i>L'Entraide Répressive Internationale et la loi française du 10 Mars, 1927</i>	288
URRUTIA, FRANCISCO JOSE: <i>Le Continent Américain et le Droit International</i>	289
BIBLIOGRAPHY	291
INDEX	303
INDEX TO VOLUMES I-X	311

DIPLOMATIC IMMUNITIES—MODERN DEVELOPMENTS ¹

By SIR CECIL J. B. HURST, G.C.M.G., K.C.B., K.C.

ON July 18, 1928, the House of Lords gave judgment in the case of *Engelke v. Musmann*.² This is the first decision of importance in the English courts for some time past on the subject of diplomatic immunities, and the case illustrates developments which are taking place in connexion with those immunities.

Two noticeable points are, firstly, that the report of the case in the Law Reports shows that the member of the staff of the German Embassy whose privilege came in question bore the title of "consular secretary"; and secondly, that in the later stages of the litigation the Attorney-General intervened as a party on behalf of the Crown and made a communication to the Court on behalf of the Secretary of State for Foreign Affairs, embodying what was intended to be an official pronouncement.

The facts of the case out of which the litigation arose were that Mr. Engelke was in the service of the German Government and was employed at the German Embassy in London. The title which he bore at the material dates was that of "consular secretary", a term which is modern and is certainly not included among those enumerated in the regulations adopted at the Congress of Vienna; nor will it be found in guides to diplomatic practice, such as those of Sir Ernest Satow or M. Pradier Fodéré. Engelke rented a house at Hampstead, and he and his landlord fell out. The latter instituted proceedings in the Court of King's Bench, and Mr. Engelke pleaded his diplomatic immunity.

The case came into court because Engelke, in support of his claim to diplomatic immunity, filed an affidavit, and the plaintiff applied for leave to cross-examine the deponent as to the facts asserted in the affidavit. Clearly the purpose of the cross-examination was to show that Mr. Engelke's work in the Embassy was not such as to entitle him to immunity, that the work he was doing was consular work, not the work of a diplomatist; and it will be generally admitted that diplomatic immunities are not enjoyed by consuls.

A summons in chambers was taken out, asking for an order to be made that Engelke should attend for purposes of cross-examina-

¹ The substance of this article was delivered as a lecture at University College, London, on January 16, 1929.

² L.R. [1928] A.C. 433.

tion. The Master said "No": on appeal the Judge in Chambers said "Yes": on appeal from the Judge in Chambers the Court of Appeal by a majority of two to one said "Yes". On appeal from the Court of Appeal the House of Lords unanimously said "No".

On the hearing of the appeal before the Court of Appeal, the Attorney-General attended to give information to the Court. At their invitation he informed the Court, on the instructions of the Secretary of State for Foreign Affairs, that the defendant had been appointed a member of the staff of the German Ambassador under the style of "consular secretary", and that his position as a member of the embassy was and had been since his appointment in 1920 recognized by the British Government without reservation or condition of any sort.

When a person is employed on the staff of an embassy or legation and in the course of proceedings before a court of law claims that by virtue of that employment he possesses a diplomatic status and is entitled to the privileges and immunities which flow therefrom, the decision whether or not he does possess that status must lie with some one. With whom does it lie? The decision of the House of Lords shows that if the appropriate organ of the Executive Government intimates to the court that the person in question is recognized by the Crown as possessing a diplomatic status, the statement is conclusive, and in that event the decision on the point is taken out of the hands of the court.

Even so, however, the decision still has to be taken by some one. The organs of the Executive Government cannot make statements of this kind at random, and therefore when a person who admittedly fills the post of "consular secretary" at an embassy claims diplomatic privileges and immunities as such, the point has to be decided by some one whether this consular secretary is entitled to be regarded as possessing a diplomatic status.

It is interesting to find that there should be any one on the staff of an embassy at all whose position is rightly described by the name of "consular secretary". The diplomatic service and the consular service used to be quite distinct: but it seems that now certain Governments are finding it convenient to concentrate the control of both the diplomatic and the consular establishments which they maintain in a foreign country in the hands of the head of the mission. Clearly a Government is entitled to do so if it thinks fit; but how does it affect the right to diplomatic immunities enjoyed by members of the staff who may be occupied with consular work? Anything like an amalgamation of the diplomatic and

DIPLOMATIC IMMUNITIES: MODERN DEVELOPMENTS 3

consular services would lead to a large increase of staff under the direct control of the head of the mission: are they all to enjoy diplomatic immunities? Since this depends primarily on the status they enjoy and since the decision on this point lies with the Executive Government and not with the courts, there must be some principles to guide the individuals responsible for that decision; to arrive at right conclusions one must be clear as to the fundamental basis on which all diplomatic privileges and immunities rest.

One of the foremost principles of international law is that the sovereign authority of the state is supreme over all persons and over all things within the limits of its jurisdiction.

In early times the sovereign exercised in person a great deal of the authority which is now exercised in his name. Relations with other sovereigns were essential from time to time, and for the purpose of that intercourse use had to be made of representatives. Sovereigns could not leave their kingdoms and neglect all other affairs of state in order to transact their business with their brother sovereigns themselves. Nevertheless the individual representative who was sent was in very truth the representative of the sovereign who sent him, and remained subject to that sovereign's orders and control even though he had entered into the territory of the other state. Similarly, though present in the territory of the other sovereign, he was received upon the footing that he came as the representative of his own sovereign, and was not subject to the authority of the sovereign of the country to which he had come. On no other basis would ambassadors in early days have been sent. The King of England would not have sent on some particular occasion an ambassador to the King of France if from the moment when he landed on the shores of France the ambassador was subject to the authority of the King of France to the same extent as all the people of that country. What is more, it was to the advantage of the sovereign of one country to respect the privileges of the representative of another sovereign, because on no other footing could he expect the privileges of his own representatives to be respected. Hence mutual advantage and a sense of the fitness of things combined to ensure that the representatives of a foreign sovereign would not be regarded as subject to the local jurisdiction.

After the system of permanent diplomatic representatives at the various courts had come into being the same principle was observed. Those representatives were received upon the footing

that they were not to be subject to the authority of the sovereign to whom they were accredited. Diplomatic privileges as commonly recognized to-day are little more than the agreed consequences of the mutually accepted obligations incumbent upon states to treat foreign representatives as exempt from the local jurisdiction. As said Lord Campbell: "He (i. e. a foreign ambassador) does not owe even a temporary allegiance to the sovereign to whom he is accredited."¹ If he owes no allegiance, the authority implied in the relation of sovereign and subject is absent, and so is the jurisdiction which allegiance connotes.

The position of a foreign representative is one of "extra-territoriality" in the proper sense of that term. An Englishman in Turkey in the days before the war enjoyed a position of extra-territoriality—he was not subject to the jurisdiction of Turkey; Turkish legislation did not bind him; Turkish courts did not exercise jurisdiction over him. Though he was physically present in Turkey it was not Turkish authority to which he was subject. It is the same with a foreign diplomatic representative. It is not the courts or the laws of the country in which he is stationed to which he is subject. It may be his duty to comply with those laws, but in cases where it is so, that duty springs from the obligation which is incumbent upon him as the representative of a foreign sovereign to refrain from any action which may prejudice the well-being of the country in which he is dwelling—not from the fact that failure to comply with the law may expose him to punishment in the local courts.

This non-subjection, however, to the local law is admitted because the purpose of the individual's presence is the maintenance of relations between the sovereign whom he represents and the sovereign to whom he is accredited. The privileges which he is accorded are conditioned and limited by the purpose for which he is received. If the representative is called upon by his own sovereign to perform functions other than those of maintaining relations with the sovereign to whom he is accredited, the purpose with which the latter acquiesces in his non-subjection to the local jurisdiction ceases to operate in respect of those functions. The extraterritoriality or non-subjection to the local jurisdiction enjoyed by a member of a foreign diplomatic mission is, therefore, due, not to the fact that he is engaged on the business of a foreign Government, but to the fact that he is part of the machine for maintaining relations between the two Governments.

¹ *Magdalena Steam Navigation Co. v. Martin*, 2 E. & E., p. 111.

The report in *Engelke v. Musmann* shows that Germany is one of the countries whose Government is finding it convenient to put the consular establishment which it maintains in a foreign country under the control of the head of the diplomatic mission. It is not the only country which is doing so. In some cases it seems that there is an actual fusion of the diplomatic and consular services going on, but again the result is that the head of the diplomatic mission is put in control of all the work, whether diplomatic or consular.

Despite the importance of the functions performed by consular officers—particularly to the nationals of the country concerned who may find themselves in the state where the consul is stationed—no difficulty has been found hitherto in their carrying out their duties even though they are subject to the local jurisdiction. There can, therefore, be no need to change the rule that consuls are not entitled to the immunities and privileges of a diplomatic representative. Anything, however, in the nature of a fusion of foreign diplomatic and consular establishments and the vesting of the control of both in the head of the mission is likely to lead to a substantial increase in the size of his staff, and to result in several of the members of the staff being themselves engaged in doing consular work, or in the supervision of the work of the consuls. They will be occupied with work which has nothing to do with the maintenance of relations between their own country and the country in which they are stationed.

A large increase in the number of persons entitled to diplomatic immunities is an evil from the point of view of the local administration. A Government is bound to look askance at the presence of a large number of persons immune from its jurisdiction. Its duty to its own nationals obliges it to refrain from acquiescing in any undue growth in the number of those who are acknowledged to be entitled to the privilege. From the moment when it is suggested that particular members of the staff of an embassy or legation are engaged in work alien to the normal functions of a diplomatic mission, the Foreign Office or Ministry for Foreign Affairs concerned must necessarily be on its guard to see that the claim to diplomatic immunities is not admitted without due scrutiny. On the other hand, the head of the mission concerned will be anxious to see that the liberty of his staff to carry out unimpaired the mission with which they are charged is not curtailed.

Here is a situation requiring frank discussion and tactful handling. Friction can only be avoided if there is on both sides recognition of the controlling principle. That I conceive to be that

in order to be entitled to the privilege a member of the staff must be working under the direct control and orders of the head of the mission *in his diplomatic capacity*, that is to say, he must be concerned with the work of the head of the mission as the channel of communication with the Government to which he is accredited, and not concerned only with non-diplomatic work which the Government may entrust to the head of the mission. That presumably is the criterion with which Mr. Engelke was found by the Foreign Office to comply before the Attorney-General on behalf of the Foreign Secretary made to the Court of Appeal the communication as to Mr. Engelke's position which the House of Lords held to be conclusive as to his right to diplomatic immunities.

If I am right in thinking that the principle which lies at the root of the recognition of diplomatic immunities is that if the representatives of a foreign sovereign were subject to the local jurisdiction they could not discharge adequately the duties entrusted to them and would be placed at a disadvantage in their relations with the sovereign to whom they are accredited, and that it is only for the purpose of maintaining relations between the two states that this immunity from the local jurisdiction is necessary, it may seem strange that of recent years some treaties establishing arbitration tribunals have contained provisions to the effect that the members of the tribunal shall when engaged in the exercise of their functions be entitled to diplomatic immunities. Members of an arbitration tribunal are not engaged in maintaining relations between Governments. Why should they enjoy diplomatic immunities?

The first international convention to contain any such provision was that concluded at the First Peace Conference at The Hague in 1899, the Convention which set up the Permanent Court of Arbitration. Since then corresponding provisions are to be found in Article 47 of the analogous Convention concluded at the Second Peace Conference in 1907, and in Article 19 of the Statute of the Permanent Court of International Justice.

Treaties like that of Washington, 1871, which set up the Alabama Tribunal, contained no provision according diplomatic immunities to those who served upon it. Did the members of that tribunal occupy in respect of the local jurisdiction a position different in any respect from that of members of a tribunal instituted under the Conventions of 1899 or 1907? That is a question which it is not easy to answer because there are no precedents to guide us. Members of an arbitration tribunal do not come in conflict with the local jurisdiction, they are not given to com-

mitting crimes nor do they become involved in litigation. If the question had ever arisen, at any rate if it had arisen during the nineteenth century, it would, I think, have been impossible to maintain that the members of international arbitration tribunals were not subject to the local jurisdiction.

What the introduction of a provision such as Article 24 of the 1899 Convention signifies is the beginning of a realization that a member of an international tribunal ought not to be subject to the local jurisdiction, and the need of a conventional rule which should have the effect of relieving him from it. If a member of an international tribunal is to perform his functions properly, he must be in a position of complete independence in respect of both the states which are parties to the dispute he is to settle. In many cases an international arbitration is held in the territory of one of the disputing states. If the arbitrator were in theory subject in all respects to the jurisdiction of one of the parties and not to that of the other; if, for instance, he were liable at any moment to be arrested by the authorities of one of them and to have all his papers searched—no matter on how trumped-up a charge—the two parties would not stand on a footing of equality before him; nor would he stand to them in a position of independence. To perform his task properly he should be in a position to hold the balance evenly between them and must stand in a position of independence as regards both of them. What a member of such an international tribunal requires, therefore, is exactly what the member of a diplomatic mission requires—a position of non-subjection to the local jurisdiction.

From the technical point of view the phrase employed in the 1899 Convention—that the members of the tribunal are to enjoy diplomatic immunities—is unfortunate; the functions they are fulfilling are not diplomatic; but the phrase is sufficient to achieve its purpose; it implies that they are not to be subject to the local jurisdiction.

The question of the enjoyment of “diplomatic immunities” by members of international tribunals is not wholly academic in character nowadays, and for this reason. It sometimes happens that a tribunal of an international character is set up which has to deal with a volume of work so large as to entail practically permanent residence on the part of the judges, and the question will then arise as to the extent to which they should be relieved of local taxation. The extent to which members of a diplomatic mission benefit by fiscal immunities is a matter of international comity rather than of international law. States have developed their own

customs and traditions and these are by no means identical in all cases, but the rule is practically universal that a diplomatic representative is not subject to direct taxation on his official emoluments. To what extent does this rule apply to the members of an international tribunal whose sittings are held in one of the countries concerned and under the laws of which direct taxation in the form of income tax is levied on all persons within the jurisdiction?

By the Treaty of Versailles tribunals were instituted—called Mixed Arbitral Tribunals—with jurisdiction to deal with claims for debts between Allied and German nationals and claims by Allied nationals against the German Government for the treatment of their property in Germany during the war. The Anglo-German Mixed Arbitral Tribunal sits in London. It is still at work and its chairman—a neutral—if he had held the appointment continuously would already have been resident in London for nearly ten years; yet the work of the Tribunal is still unfinished. Is he liable to pay income tax on his salary like the rest of the inhabitants of the country? On principle the answer certainly should be “No”. To discharge his functions properly and to hold the scales even between the two states concerned, he must be in a position of independence from the local jurisdiction; and that independence should carry with it immunity from direct taxation imposed upon him by the state in which he is physically present; but the provisions of the Treaty of Versailles setting up the Mixed Arbitral Tribunal contain no statement that the members of the tribunal are to be entitled to diplomatic immunity. Has the stage been reached when the treaty provisions embodied in The Hague Conventions of 1899 and 1907 and in the Statute of the Permanent Court of 1920 represent what has become one of the understandings of international law? It seems probable that this is the position. In these days a Government would be thought to be acting contrary to the practice now obtaining among states if it attempted to subject to its own jurisdiction a member of an international tribunal who happened while engaged in the exercise of his duties to be physically present within its territory.

This branch of the subject is carried a little further by the provision which is embodied in Article 7 of the Covenant of the League, which provides that representatives of the Members of the League and officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities. Here, again, the phrase “diplomatic immunities” has been used somewhat loosely, as in the case of the conventions establishing the

international arbitration tribunal, though somewhat less so. The functions of the League are more akin to diplomatic functions in the strict sense of the word, but again the phrase is adequate to express the real purpose, which is that the individuals who by Article 7 are to enjoy these diplomatic immunities are thereby to be placed, when engaged on the business of the League, in a position of non-subjection to the local jurisdiction.

Such records as have been published show that no particular attention was directed to the operation of this provision of the Covenant. It was proposed and was accepted as a right and proper principle which should apply, but in practice its application has not been altogether easy by reason of the extent to which it brings into play the question whether an individual can enjoy diplomatic protection against the state of which he is himself a national. The headquarters of the League are now in Geneva. A large number of the members of the Secretariat, particularly of its subordinate staff, are of Swiss nationality. To what extent are they entitled to privileges and immunities as against their own Government when they are engaged on the business of the League?

The British practice with regard to this point is reasonably clear. The decision of the Court of Queen's Bench in the case of *Macartney v. Garbutt*¹ states the principle quite clearly. Sir Halliday Macartney was a British subject who was in the service of the Chinese Government and was stationed at their Legation in London with the rank of Counsellor of Embassy. No objection or condition had been made by the Foreign Office at the time of his appointment to his serving in this capacity on the staff of the Chinese Legation, and it was held that in these circumstances he could not be obliged to pay rates on the house that he occupied. The decision makes it clear that a Government is entitled to refuse to receive one of its own nationals as a member of the diplomatic staff of a foreign embassy or legation, but if it receives him and makes no stipulation to the effect that he shall be subject to the local jurisdiction, he is entitled to the same measure of privilege and immunity as is accorded to the foreign members of the staff. It is the practice of most states to-day to object to receiving their own nationals as members of foreign diplomatic missions, otherwise than in a subordinate or domestic capacity. This they clearly are entitled to do, but no state which was a party to the Treaty of Versailles, nor any neutral state in becoming a Member of the League of Nations, appears to have subordinated its

¹ 24 Q.B.D. 368.

acceptance of the Covenant to any proviso that its own nationals should not be entitled under Article 7 to diplomatic immunities or privileges against their own Government. The extension of the activities of the League to all countries renders this a question which is of more than local interest. The League of Nations maintains branch offices in London, Paris, and Rome. Inquiries or conferences constantly entail the presence of members of the Secretariat in foreign countries. It will, therefore, frequently happen that an official of the League will be engaged on duties of the League in the country of which he is a national. Is there any implied limitation on the operation of Article 7 which restricts it to officials of the League of foreign nationality?

On principle the answer should certainly be "No". The primary function of the League is the maintenance of peace. Even when it is engaged on work of international co-operation or on work of a humanitarian kind, it is with a view to improving the relations between states and with the ultimate purpose of encouraging peace by the elimination of the causes of war. Its officials must, therefore, be in a position to hold the balance even between the different states concerned in any particular matter which they are handling, even though one of those states is that of which the individual official concerned is a national. To do this they should not be dependent on or subject to the local jurisdiction.

It is too early, however, to say that this understanding of the effect of Article 7 is universal.

In Switzerland, the country most concerned, the immunities to be enjoyed by officials of the League, including those of Swiss nationality, have been the subject of agreements between the Secretary-General of the League and the Swiss Government in which there has been a certain amount of give and take. As regards other Governments, there has not yet been sufficient scope for the application of this article for any clear understanding as to its effect to have arisen.

A second point was mentioned at the beginning of this article as noticeable in connexion with the case of *Engelke v. Musmann*, viz.: that at the hearing before the Court of Appeal the Attorney-General attended to give information to the Court, and at their invitation and on the instructions of the Secretary of State for Foreign Affairs made a statement to the Court as to the position of the defendant, Engelke. In the appeal to the House of Lords the Attorney-General obtained leave to intervene upon the ground that the issues raised might affect the interests of His Majesty in

the conduct of foreign affairs and his relations with foreign states. The contentions of the Attorney-General were submitted to the House in a written case, in which it was contended that if a statement made on behalf of the Crown as to the position of a member of the diplomatic staff of a foreign ambassador was not conclusive and if the Court could go behind the statement and themselves seek to investigate the facts, compelling for this purpose the person on behalf of whom immunity is claimed to submit to legal process, it would be impossible for His Majesty to fulfil the obligations imposed upon him by international law and the comity of nations, since the steps taken to investigate the claim would themselves involve a breach of diplomatic immunity.

The judgments of the Law Lords are chiefly taken up with the question whether or not the statement made by the Attorney-General before the Court of Appeal on behalf of the Crown as to the position of the defendant was or was not conclusive. The decision of the House is summarized in the head-note to the case as being: "That the statement of the Attorney-General was binding on the Court and that the defendant was, therefore, entitled to diplomatic privilege."

If one reads the reports of the old cases during the eighteenth and nineteenth centuries, in which questions arose as to whether individuals were entitled to diplomatic immunities, no trace will be found of any intervention in the suit by the Law Officers in their official capacity. It is conceivable that the explanation of this absence of any record of intervention by the Law Officers of the Crown is to be found in the fact that such intervention would always be made for the purpose of protecting the privileges of the diplomatic representative and would thus result in the termination of the proceedings and would leave nothing for the reporter to report. In that case, however, one would expect to find reference to this mode of intervention by the Law Officers in the old practice books. There is a dictum by Lord Mansfield in the case of *Heathfield v. Chilton*¹ which shows that intervention by the Law Officers was not impossible. In that case the defendant claimed to be discharged out of the custody of the marshal upon the ground that he was a domestic servant to the Minister of the Prince Bishop of Liège. Lord Mansfield in his judgment says: "I find this is not an application by the Attorney-General by the instruction and at the expense of the Crown. That indeed would have shown that the Crown thought this person entitled to the character of a public minister."

¹ 4 Burr. 2015.

In *Carolino's* case¹ the Attorney-General appeared on behalf of the defendant, but there is nothing in the report to suggest that he was acting in this case at the instance of the Crown, and the report leaves the impression that the Attorney-General was acting in pursuance of the then existing right to take private practice.

In France and in Belgium the reported cases show that, when circumstances require it, the authorities of the state intervene and prevent encroachments by the courts on the privileges of foreign diplomatic representatives.

In 1891 the Cour de Cassation in France quashed a judgment in default which had been given by the Civil Tribunal of the Seine against the Counsellor of the Belgian Legation in Paris, against whom proceedings had been initiated to recover a personal debt, but who had ignored the case and had allowed judgment to go by default. This decision of the Cour de Cassation was pronounced at the instance of the Ministry of Justice and after the Court had listened to a pleading by Maître Desjardins on behalf of the Ministry of Justice which has become a classic and is worthy of study by any student of this branch of the law.²

Similarly, in 1897 the Cour de Cassation at Brussels quashed a judgment which had been given by default in the lower court against the Turkish military attaché in Belgium who had employed a veterinary surgeon to attend to his dog and had omitted to pay the bill. When the veterinary surgeon brought an action, the attaché ignored the proceedings and judgment went by default, but at the instance of the Ministry of Justice the judgment was quashed in the Cour de Cassation after an elaborate exposé of the whole question by the Procureur Général, in which the authorities and precedents were considered.³

The recent dates of these cases are suggestive. The French case, which is the earliest, is as recent as 1891, the Belgian case is 1897, and the English case now under consideration is 1928. They show that the need for government intervention is a development of modern times. They also show that the right of the Government to intervene is well established, and, so far as Great Britain is concerned at any rate, they show that the conclusion of the Executive Government is binding on the courts.

The question of the right of a particular individual to diplomatic status is thus now to be included among those on which the decision rests with the Executive Government and not with the courts, just

¹ 1 Wils. 78.

² *Journal de Droit International Privé*, 1891, p. 144.

³ *Ibid.*, 1897, p. 839.

as it does on the question whether a particular Government is to be recognized as the Government of the country where it is established.

A moment's consideration will show that there are advantages in allowing the decision on the point to rest with the executive authorities. The existence of diplomatic privileges may always lead to abuse. With the growth in the numbers of the Corps Diplomatique in a capital such as London or Paris, questions must arise from time to time requiring tactful handling if trouble is to be avoided. On one side there is the representative of a foreign state, jealous of any encroachment on the liberty of himself and his colleagues to carry out their mission. On the other a Government responsible for seeing that its nationals are not prejudiced by any abuse of these privileges. It is clearly better that the discussions which may be necessary before the question at issue in connexion with some particular diplomatist can be adjusted should take place in the tranquillity of a government office rather than in the publicity of a law court. If this is so, however, it is necessary that the solution which is reached between the foreign representative concerned and the official with whom the case is discussed should prevail. The head of the foreign mission could scarcely be expected to discuss the question with a representative of the Executive Government if the solution arrived at were liable to be reopened in the courts; if in fact the opinion pronounced by or on behalf of the appropriate Minister of the Crown were not to be conclusive.

The conclusion would appear to be that the principle on which all diplomatic immunities rest is that of non-subjection to the local jurisdiction—extraterritoriality in the true sense of the term; but the purpose for which these immunities are recognized is to enable the members of a foreign mission to act effectively as the representatives of their own sovereign in the maintenance of relations with the sovereign to whom they are accredited, not to enable them to fulfil tasks lying outside that primary function. Developments are taking place as regards the tasks imposed upon diplomatic missions and as regards the categories of persons engaged on international work who should be free from subjection to the local jurisdiction. The final decision rests with the Executive Government, not with the courts, as to what individuals are entitled to this privilege, and this enables the adjustments in the application of the fundamental principles, which are necessary for meeting these new developments, to be made satisfactorily.

THE PAN-AMERICAN AND LEAGUE OF NATIONS TREATIES OF ARBITRATION AND CONCILIATION¹

By SIR JOHN FISCHER WILLIAMS, C.B.E., K.C.

THE draft treaties of arbitration and conciliation approved at the Pan-American Conference of January 1929 will be examined by lawyers on this side of the Atlantic with interest and sympathy. In particular it is tempting to institute a comparison with the model treaties elaborated last September at Geneva. How has the Pan-American Conference dealt with problems such as that of distinguishing international questions which are proper for arbitration from those which have to be dealt with in some other way?

On this question of the definition of the justiciable dispute we may set the two solutions in parallel columns:

Geneva (September 1928).

Draft "*Bilateral Convention for the Pacific Settlement of all International Disputes*".

Article 4. "All disputes with regard to which the parties are in conflict as to their respective rights shall be submitted for decision to the Permanent Court of International Justice, unless the parties agree, in the manner herein-after provided, to have recourse to an arbitral tribunal.

It is understood that the disputes referred to above include in particular those mentioned in Article 36 of the Permanent Court of International Justice.

Pan-American Conference (January 1929).

Draft "*Treaty of Arbitration*".

Article 1. "The high contracting parties bind themselves to submit to arbitration all differences of an international character which have arisen or may arise between them by virtue of a claim of right made by one against the other under treaty or otherwise, which it has not been possible to adjust by diplomacy and which are juridical in their nature by reason of being susceptible of decision by the application of the principles of law.

There shall be considered as included among the questions of juridical character:

- (a) The interpretation of a treaty.
- (b) Any question of international law.
- (c) The existence of any fact which, if established, would constitute a breach of an international obligation.

¹ For the text of the Pan-American treaties see pp. 22-31, *post*. The text of the Geneva General Act and Model Conventions will be found in the *Monthly Summary of the League of Nations*, Vol. VIII, No. 9, pp. 298 *et seq.* (Information Section of the League of Nations.)

- (d) The nature and extent of the reparation to be made for the breach of an international obligation.

The provisions of this treaty shall not preclude any of the parties, before resorting to arbitration, from having recourse to procedures of investigation and conciliation established in conventions then in force between them.

Article 2. There are excepted from the stipulations of this treaty the following controversies:

- (a) Those which are within the domestic jurisdiction of any of the parties to the dispute and are not controlled by international law; and
(b) Those which affect the interest or refer to the action of a state not a party to this treaty."

The Geneva formula is substantially identical with that of Locarno. In comparison with the Pan-American formula, it has the advantage in point of brevity, even if we allow for the fact that it is able to make a reference only to the Optional Clause instead of inserting the text of that clause in full. The Pan-American formula by Article 1 (we neglect for the moment the provisions of Article 2) requires explicitly that the difference be "of an international character", and adds to the Locarno requirement (that the dispute is one of "rights") the further condition (taken apparently with some modification and, it is conceived, with some improvement from the formula of the proposed Franco-American Arbitration Treaty) that the difference should be "juridical in its nature by reason of being susceptible of decision by the application of the principles of law."

What, however, does this further condition add to the requirement that the difference is one arising "by virtue of a claim of right . . . under treaty or otherwise"? Can there be such a thing as a claim of right which is not juridical in its nature, "juridical" being interpreted, according to the next following words of the Pan-American Treaty, as "susceptible of decision by the application of the principles of law"—(Note, reader, that "law" is here spoken of without qualification; the treaty does not say "international law")—or is there here a subtle suggestion that there may be "gaps" in the law?

Both drafts agree in bringing in (but in slightly and significantly different language) the four categories of questions mentioned in Article 13 of the Covenant and established by the "Optional Clause" (Article 36) of the Statute of the Permanent Court of International Justice, and in treating these categories as furnishing examples of questions fit for legal decision, but not as rigid definitions limiting the sphere of arbitration. Both texts have over the Optional Clause itself the indisputable superiority that they omit the unfortunate word "legal" which appears in that clause. This is to recognize the Optional Clause as what in fact it is—namely, an effort to state the matters which at the time when it was drafted were thought to be ripe politically for arbitration, not a scientific or limiting classification of "legal" disputes. This is to the good. But it may be suggested for consideration whether the language of both these treaties might not have been improved by enlarging the third of the categories of the Optional Clause and including indisputably within the jurisdiction any difference as to *any* question of fact. There is no scientific—it may be doubted at the present day whether there is any practical—reason for refusing to submit to legal decision any international dispute as to a fact.

As to the last paragraph of Article 1 of the Pan-American text, this has its counterpart in Article 6 of the Geneva draft and need not detain us now.

This brings us to the exceptions introduced by Article 2 of the Pan-American treaty—exceptions to which the Geneva draft supplies no parallel. Let it be noted at once that the old nullifying phrase "honour or vital interests" has disappeared. This is a great advance. We need waste no words on the funerals of many dead importances or on the real progress implied by their disappearance. But Article 2 is drafted rather with a view to soothing anxieties than as a logical attempt at scientific definition. It aims at making it clear that the agreement does not include as "justiciable", controversies as to (a) domestic matters, or (b) the rights of third parties; it seeks to achieve this result by making exceptions to Article 1.

But controversies which are within the domestic jurisdiction of any of the parties are not "differences of an international character" within the general words of Article 1, and, therefore, are not properly referred to by way of exception to those general words. The Geneva draft, as already remarked, has no similar exception, as presumably the draftsman felt a modest confidence that if one state were to complain against another in respect of a matter

within the domestic authority of the defendant state, the Permanent Court might be trusted to decide in the defendant's favour. But the Pan-American article does not except controversies which possess the sole characteristic of being within the domestic jurisdiction; the excepted controversies must possess two characteristics: (1) the not being within the domestic jurisdiction, and (2) the not being controlled by international law. If a controversy is "controlled by international law" can it properly be said to be within the domestic jurisdiction?

The main purpose of the addition of the reference to international law is, however, plain; if some topic originally within domestic jurisdiction—e.g. a customs tariff—has been brought into the international sphere—e.g. by a commercial treaty—it is a proper subject of arbitration.¹

The second Pan-American limitation excludes controversies "which affect the interest or refer to the action of a state not a party to this treaty". This phrase calls for careful examination. It is not—what at first sight it might be thought to be—a reservation, similar to that which has figured in other arbitration treaties, of the rights or interests of a state not a party to the arbitration. The state whose interests or action prevents the signatory states from settling their justiciable differences by arbitration is not a state which is a stranger to the dispute but a state which is a stranger to the Pan-American arbitration treaty. And the states which are strangers to that treaty are all non-American states. This reservation is in fact intended not to protect third states but to safeguard the Monroe Doctrine; its authorship is ascribed by Dr. J. B. Scott² to Mr. C. E. Hughes. "Mr. Hughes's clause," says Dr. Scott, "which impliedly exempts the Monroe Doctrine or rather exempts it expressly without mentioning its name, is evidence both of skill in drafting and of statesmanship in conception."

In these conditions there is no advantage in seeking to derive from this clause instruction of value for the drafting of arbitration treaties of general application. Let us merely note in passing that if the phrase "refer to the action" includes a reference to past conduct, the clause apparently excludes from arbitration all disputes as to boundaries or territorial sovereignty in which one of the American disputants is claiming as a successor to a European Power, as the United States claimed as successor to Russia in the

¹ Cf. Advisory Opinion No. 4 of the Permanent Court of International Justice (Tunis and Morocco Nationality Decrees).

² *American Journal of International Law*, Vol. XXIII, pp. 143 *et seq.* (January, 1929).

Alaska Boundary question and to Spain in the recent arbitration with the Netherlands as to Palmas Island. In such a dispute an historical inquiry as to the action of the European Power is inevitable.

The Geneva draft naturally deals with the matter of the interests of a third Power, whether or not a party to the treaty, on other lines (see Article 34 of the Bilateral Convention). The fact that a third Power has or claims an interest is no bar to the settlement of the controversy; if it has an interest of a legal nature which may be affected by the decision, it may ask to intervene.

So much for the solutions which the two model treaties give to the question of the definition of the justiciable controversy. We may now look at another important point: the decision as to whether any particular disputes lie within or without the treaty. If one Power asserts that a particular dispute is within the agreement and another that it is not, with whom is the decision to lie? The Pan-American text is silent on this point. The Geneva text (Article 35) sends to the Permanent Court disputes as to the interpretation or application of the Convention "including those concerning the classification of disputes". This contrast brings into relief the great advantage which results from the existence of a permanent and recognized tribunal. The Pan-American text could not well provide that the arbitrator or tribunal was to decide this point, because under the Pan-American scheme it is only by agreement of the parties that the arbitrator or tribunal is appointed. What, then, is to happen under this scheme if one of the Powers declares that a question is not justiciable within the meaning of the agreement, and refuses to concur in any appointment of an arbitrator or tribunal? Is the solution that as the question whether the matter was or was not justiciable is a question of the interpretation of a treaty, the dissentient Power is bound to submit this preliminary question in the first instance to arbitration under the treaty? ¹

The rules of the Hague Convention for the Pacific Settlement of International Disputes ² have not been made applicable; it cannot be intended to leave this question to the special *compromis* as, if

¹ A parallel to this solution is to be found in the provisions of Article 13 of Annex II to Part VIII of the Treaty of Versailles, which, after providing for the treatment of questions of interpretation, sets up a procedure of arbitration for the decision (*inter alia*) of the point whether any particular question is or is not one of interpretation.

² Article 48 of the Convention of 1899 and Article 73 of the Convention of 1907. See a note by Professor Brierly in the *Year Book* for 1928, p. 114.

one of the states concerned denies the applicability of the treaty, no *compromis* will ever come into being.

Article 3 of the Pan-American treaty provides for the constitution of the tribunal—a question which on the Geneva draft has its importance only if the parties deliberately choose to oust the jurisdiction of the Permanent Court and resort to a specially created tribunal. In the first instance, it is left to the parties themselves to designate the tribunal. They could, therefore, if so advised, go before the Permanent Court of International Justice. If this fails, there is to be a tribunal of five arbitrators constituted on the general principles of The Hague Conventions of 1899 and 1907: each party chooses two arbitrators, but subject to the limitation that it may only choose one of its own nationals or one of its nominees in the panel of the (so-called) Permanent Court of Arbitration. The other nominees of each party, however, “may be of any other American nationality”¹, and the president is chosen by the four nominees of the parties without restriction as to nationality. There is a residuary provision for the appointment of the president if the four nominees cannot agree. The Geneva text (Article 5) provides for a special agreement which is to cover both the definition of the subject of the dispute and the appointment of the arbitrators. It thus covers by one article the subject-matter both of Article 3 and Article 4 of the Pan-American draft.

Article 4 of that draft, indeed, is devoted to the subject of the *compromis*, the “special agreement” which “shall clearly define the particular subject-matter of the controversy” and which in the event of failure to reach agreement is to “be formulated by the Court”—the Court having been already constituted by the parties under Article 3 before they have formulated the subject-matter of the controversy. This point, again, may well give rise to a reflection as to the great advantage of a permanent tribunal. The *compromis* is also to fix the seat of the Court and the rules to be observed in the proceedings and other agreed conditions of the litigation. What the relation of the Senate of the United States is to these provisions is not a matter which it would be profitable for a British lawyer to discuss.

The other articles of the Pan-American treaty deal with the filling of vacancies in the court, the application of the agreement to multilateral controversies, the binding character of the award, the powers of the tribunal to interpret its award, the effect of reserva-

¹ This no doubt means that he must *not* be a non-American: is a Canadian eligible?

tions, ratification, adhesions by "any American state not a signatory", &c. They seem not to call for any special comment. But it should be remarked that it is strange that the treaty contains no reference to the position of signatory or adhering states which have already accepted the obligatory jurisdiction of the Permanent Court of International Justice. If a dispute arises between two such states, which instrument governs?

The Pan-American treaty is drawn up in English, Spanish, Portuguese, and French, and apparently, there being no express provision to the contrary, all the texts are of equal authority. Possibly some of the verbal difficulties in the English text may be dispelled by the texts in the other languages.

On the whole Pan-American treaty the comment of the European observer will tend to be that while the American states are to be congratulated on producing a draft which represents an advance on any general American arbitration treaty hitherto concluded, we have not in this treaty a model of the final form which such instruments may be expected to take. The student is indeed prepared for this conclusion by the delicately expressed reference in the preamble to the realization of aspirations "in the most ample manner possible under present international conditions". And possibly an American would say that we have here by implication an excellent defence for whatever theoretical defects there may be in the treaty. *Judicat orbis terrarum*—but is it right to say *securus*?

As to the reservations in the Pan-American treaty, it is understood that according to the *New York Times* the main reservations intimated by certain American states are:

- (1) A provision that pecuniary claims shall not be submitted to obligatory arbitration until it has been proved that there was a denial of justice in the local courts.
- (2) A reservation providing that questions arising from facts which occurred before the signing of the present treaty shall not be submitted to compulsory arbitration. Reservations of this nature are, it is stated, being entered by nations having pending boundary disputes or similar territorial questions.
- (3) A reservation excluding from arbitration questions covered by existing treaties.

This last reservation would meet, for the states making it, the point above noticed as to the priority of the obligatory jurisdiction of the Permanent Court.

As to the second reservation, difficult questions might arise as to its scope. Does a dispute as to the interpretation of a treaty earlier in date than the arbitration treaty "arise from facts which occurred before the signing of the present Treaty", the "fact" being the signature of the earlier treaty? Probably not. But will not the reservation exclude nearly all boundary disputes whether ancient or modern? For in such disputes the relevant facts will almost always be earlier in date than the arbitration treaty. The Locarno treaties had a similar, but not exactly the same, reservation: the provision for arbitration or judicial settlement was not to include "disputes arising out of events prior to the present convention *and belonging to the past*".

The Pan-American treaty, it will be seen, is accompanied by a Protocol providing machinery for the abandonment of reservations made and of exceptions included in the treaty, so as to admit the progressive extension of the field of arbitration. This is an interesting piece of machinery, and may prove valuable.

The draftsmen of the Pan-American Conciliation Treaty had an easier task; a detailed comparison of their work with the Geneva conciliation draft would have been interesting, but considerations of space intervene. This much may be said: conciliation results in no binding obligation; it may therefore be applied to all international controversies without limitation or exception. No nice definition is called for. The signatory Powers draw cheques upon the fund of common sense and good feeling existing in the world at large and in their own populations in particular; if the cheques are not honoured, there is no civil—not to speak of criminal—liability.

The Pan-American draftsmen did not seek to construct a new treaty complete in itself. Their draft is in the nature of an appendix to the earlier (Gondra) treaty signed at Santiago de Chile on May 3, 1923, and ratified by fourteen American Republics including the United States; it confers the function of conciliation on the commissions of inquiry constituted under that treaty. That treaty was itself built on the models of those "cooling off" treaties, which constitute the chief claim of the late Mr. William Jennings Bryan to the grateful memory of the civilized world. And yet, again, the procedure by commissions of inquiry was first given formal shape in 1899 and, more fully, in 1907 at The Hague.

The technical points which may arise on this model conciliation treaty mainly concern its relation to the arbitration treaty; for example, if a justiciable dispute arises, does Article 1 of the

conciliation treaty, covering as it does "all controversies of every kind", apply? Or must the conciliation treaty be read as subject to an exception created by the arbitration treaty for justiciable disputes? Apparently Article 13 of the conciliation treaty contemplates that arbitration is to take precedence over conciliation, but the point is not clear.

The device of conciliation has yet to be put to a serious practical test. At present it may take rank as a formalization and development of the methods of reconciling international differences which are known as "good offices" and "mediation"; ultimately it may grow into a method by which it will be possible to initiate changes by peaceful means in those parts of the legal order of things international for the time being established which are recognized by impartial minds as calling for modification. The success of conciliation for serious disputes would be evidence of a higher civilization. Whether a higher civilization will proceed by this particular machinery for international appeasement lies hid in the womb of the future.

DRAFT OF PAN-AMERICAN TREATY OF ARBITRATION.

The Governments of Venezuela, Chile, Bolivia, Uruguay, Costa Rica, Peru, Honduras, Guatemala, Hayti, Ecuador, Colombia, Brazil, Panamá, Paraguay, Nicaragua, Mexico, El Salvador, the Dominican Republic, Cuba, and the United States of America, represented at the Conference on Conciliation and Arbitration, assembled at Washington, pursuant to the resolution adopted on February 18, 1928, by the Sixth International Conference of American States, held in the City of Havana:

In accordance with the solemn declarations made at said conference, to the effect that the American republics condemn war as an instrument of national policy and adopt obligatory arbitration as the means for the settlement of their international differences of a juridical character;

Being convinced that the republics of the New World, governed by the principles, institutions, and practices of democracy and bound furthermore by mutual interests, which are increasing each day, have not only the necessity but also the duty of avoiding the disturbance of continental harmony whenever differences which are susceptible of judicial decision arise among them;

Conscious of the great moral and material benefits which peace offers to humanity and that the sentiment and opinion of America

demand, without delay, the organization of an arbitral system which shall strengthen the permanent reign of justice and law;

And animated by the purpose of giving conventional form to these postulates and aspirations with the minimum exceptions which they have considered indispensable to safeguard the independence and sovereignty of the States and in the most ample manner possible under present international conditions, have resolved to effect the present treaty, and for that purpose have designated the plenipotentiaries hereinafter named:

Who, after having deposited their full powers, found in good and due form by the conference, have agreed upon the following:

ARTICLE 1.

The high contracting parties bind themselves to submit to arbitration all differences of an international character which have arisen or may arise between them by virtue of a claim of right made by one against the other under treaty or otherwise, which it has not been possible to adjust by diplomacy and which are juridical in their nature by reason of being susceptible of decision by the application of the principles of law.

There shall be considered as included among the questions of juridical character:

- (a) The interpretation of a treaty.
- (b) Any question of international law.
- (c) The existence of any fact which, if established, would constitute a breach of an international obligation.
- (d) The nature and extent of the reparation to be made for the breach of an international obligation.

The provisions of this treaty shall not preclude any of the parties, before resorting to arbitration, from having recourse to procedures of investigation and conciliation established in conventions then in force between them.

ARTICLE 2.

There are excepted from the stipulations of this treaty the following controversies:

- (a) Those which are within the domestic jurisdiction of any of the parties to the dispute and are not controlled by international law; and
- (b) Those which affect the interest or refer to the action of a State not a party to this treaty.

ARTICLE 3.

The arbitrator or tribunal who shall decide the controversy shall be designated by agreement of the parties.

In the absence of an agreement the following procedure shall be adopted:

Each party shall nominate two arbitrators, of whom only one may be a national of said party or selected from the persons whom said party has designated as members of the Permanent Court of Arbitration at The Hague. The other member may be of any other American nationality. The arbitrators shall in turn select a fifth arbitrator, who shall be the president of the Court.

Should the arbitrators be unable to reach an agreement among themselves for the selection of a fifth American arbitrator, or in lieu thereof, of another who is not, each party shall designate a non-American member of the Permanent Court of Arbitration at The Hague, and the two persons so designated shall select the fifth arbitrator, who may be of any nationality other than that of a party to the dispute.

ARTICLE 4.

The parties to the dispute shall formulate by common accord, in each case, a special agreement, which shall clearly define the particular subject-matter of the controversy, the seat of the court, the rules which will be observed in the proceedings and the other conditions to which the parties may agree.

If an accord has not been reached with regard to the agreement within three months reckoned from the date of the installation of the court, the agreement shall be formulated by the court.

ARTICLE 5.

In case of death, resignation, or incapacity of one of the arbitrators, the vacancy shall be filled in the same manner as the original appointment.

ARTICLE 6.

When there are more than two States directly interested in the same controversy, and the interests of two or more of them are similar, the State or States who are on the same side of the question may increase the number of arbitrators on the Court, provided that in all cases the parties on each side of the controversy shall appoint an equal number of arbitrators.

There shall also be a presiding arbitrator, selected in the same

manner as that provided in the last paragraph of Article 3, the parties on each side of the controversy being regarded as a single party for the purpose of making the designation therein described.

ARTICLE 7.

The award, duly pronounced and notified to the parties, settles the dispute definitely and without appeal. Differences which arise with regard to its interpretation or execution shall be submitted to the decision of the Court which rendered the award.

ARTICLE 8.

The reservations made by one of the high contracting parties shall have the effect that the other contracting parties are not bound with respect to the party making the reservations except to the same extent as that expressed therein.

ARTICLE 9.

The present treaty shall be ratified by the high contracting parties in conformity with their respective constitutional procedures.

The original treaty and the instruments of ratification shall be deposited in the Department of State of the United States of America, which shall give notice of the ratifications through diplomatic channels to the other signatory Governments, and the treaty shall enter into effect for the high contracting parties in the order that they deposit their ratifications.

This treaty shall remain in force indefinitely, but it may be denounced by means of one year's previous notice, at the expiration of which it shall cease to be in force as regards the party denouncing the same, but shall remain in force as regards the other signatories. Notice of the denunciation shall be addressed to the Department of State of the United States of America, which will transmit it for appropriate action to the other signatory Governments.

Any American State not a signatory of this treaty may adhere to the same by transmitting the official instrument setting forth such adherence to the Department of State of the United States of America, which will notify the other high contracting parties thereof in the manner heretofore mentioned.

In witness whereof the above-mentioned plenipotentiaries have signed this treaty in Spanish, English, Portuguese, and French, and hereunto affix their respective seals.

DRAFT PROTOCOL ANNEXED TO PAN-AMERICAN
ARBITRATION TREATY.

Whereas, a General Treaty of Inter-American Arbitration has this day been signed at Washington by plenipotentiaries of the Governments of Venezuela, Chile, Bolivia, Uruguay, Costa Rica, Peru, Honduras, Guatemala, Haiti, Ecuador, Colombia, Brazil, Panamá, Paraguay, Nicaragua, Mexico, El Salvador, the Dominican Republic, Cuba, and the United States of America;

Whereas, that treaty by its terms excepts certain controversies from the stipulations thereof;

Whereas, by means of reservations attached to the treaty at the time of signing, ratifying, or adhering, certain other controversies have been or may be also excepted from the stipulations of the treaty or reserved from the operation thereof;

Whereas, it is deemed desirable to establish a procedure whereby such exceptions or reservations may from time to time be abandoned in whole or in part by the parties to said treaty, thus progressively extending the field of arbitration;

The Governments named above have agreed as follows:

ARTICLE 1.

Any party to the General Treaty of Inter-American Arbitration signed at Washington the third day of January, 1929, may at any time deposit with the Department of State of the United States of America an appropriate instrument evidencing that it has abandoned in whole or in part the exceptions from arbitration stipulated in the said treaty or the reservation or reservations attached by it thereto.

ARTICLE 2.

A certified copy of each instrument deposited with the Department of State of the United States of America pursuant to the provisions of Article 1 of this protocol shall be transmitted by the said Department through diplomatic channels to every other party to the above-mentioned General Treaty of Inter-American Arbitration.

DRAFT OF PAN-AMERICAN TREATY FOR CONCILIATION.

The Governments of Venezuela, Chile, Bolivia, Uruguay, Costa Rica, Peru, Honduras, Guatemala, Haiti, Ecuador, Colombia, Brazil, Panamá, Paraguay, Nicaragua, Mexico, El Salvador, the Dominican Republic, Cuba, and the United States of America,

represented at the Conference on Conciliation and Arbitration, assembled at Washington, pursuant to the resolution adopted on February 18, 1928, by the Sixth International Conference of American States held in the City of Havana:

Desiring to demonstrate that the condemnation of war as an instrument of national policy in their mutual relations set forth in the above-mentioned resolution constitutes one of the fundamental bases of inter-American relations:

Animated by the purpose of promoting, in every possible way, the development of international methods for the pacific settlement of differences between the States;

Being convinced that the "Treaty to Avoid or Prevent Conflicts between the American States", signed at Santiago de Chile, May 3, 1923, constitutes a notable achievement in inter-American relations, which it is necessary to maintain by giving additional prestige and strength to the action of the commissions established by Articles 3 and 4 of the aforementioned treaty;

Acknowledging the need of giving conventional form to these purposes, have agreed to enter into the present convention, for which purpose they have appointed plenipotentiaries as follows:

(Names of Plenipotentiaries)

ARTICLE 1.

The high contracting parties agree to submit to the procedure of conciliation established by this convention all controversies of any kind which have arisen or may arise between them for any reason and which it may not have been possible to settle through diplomatic channels.

ARTICLE 2.

The commissions of inquiry to be established pursuant to the provisions of Article 4 of the treaty signed in Santiago de Chile on May 3, 1923, shall likewise have the character of commissions of conciliation.

ARTICLE 3.

The permanent commissions which have been established by virtue of Article 3 of the Treaty of Santiago de Chile of May 3, 1923, shall be bound to exercise conciliatory functions, either on their own motion when it appears that there is a prospect of disturbance of peaceful relations, or at the request of a party to the

dispute, until the commission referred to in the preceding article is organized.

ARTICLE 4.

The conciliatory functions of the commission described in Article 2 shall be exercised on the occasions hereinafter set forth:

1. The commission shall be at liberty to begin its work with an effort to conciliate the differences submitted to its examination with a view to arriving at a settlement between the parties.
2. Likewise, the same commission shall be at liberty to endeavour to conciliate the parties at any time which in the opinion of the commission may be considered to be favourable in the course of the investigation and within the period of time fixed therefor in Article 5 of the Treaty of Santiago de Chile of May 3, 1923.
3. Finally, the commission shall be bound to carry out its conciliatory functions within the period of six months which is referred to in Article 7 of the Treaty of Santiago de Chile of May 3, 1923.

The parties to the controversy may, however, extend this time, if they so agree, and notify the commission in due time.

ARTICLE 5.

The present convention does not preclude the high contracting parties, or one or more of them, from tendering their good offices or their mediation, jointly or severally, on their own motion or at the request of one or more of the parties to the controversy; but the high contracting parties agree not to make use of those means of pacific settlement from the moment that the commission described in Article 2 is organized until the final act referred to in Article 11 of this convention is signed.

ARTICLE 6.

The function of the commission, as an organ of conciliation, in all cases specified in Article 2 of this convention, is to procure the conciliation of the differences subject to its examination by endeavouring to effect a settlement between the parties.

When the commission finds itself to be within the case foreseen in paragraph 3 of Article 4 of this convention, it shall undertake a conscientious and impartial examination of the questions which are the subject of the controversy, shall set forth in a report the

results of its proceedings, and shall propose to the parties the bases of a settlement for the equitable solution of the controversy.

ARTICLE 7.

Except when the parties agree otherwise, the decisions and recommendations of any commission of conciliation shall be made by a majority vote.

ARTICLE 8.

The commission described in Article 2 of this convention shall establish its rules of procedure. In the absence of agreement to the contrary, the procedure indicated in Article 4 of the Treaty of Santiago de Chile of May 3, 1923, shall be followed. Each party shall bear its own expenses and a proportionate share of the general expenses of the commission.

ARTICLE 9.

The report and the recommendations of the commission, in so far as it may be acting as an organ of conciliation, shall not have the character of a decision nor an arbitral award, and shall not be binding on the parties either as regards the exposition or interpretation of the facts or as regards questions of law.

ARTICLE 10.

As soon as possible after the termination of its labours the commission shall transmit to the parties a certified copy of the report and of the bases of settlement which it may propose. The commission in transmitting the report and the recommendations to the parties shall fix a period of time, which shall not exceed six months, within which the parties shall pass upon the bases of settlement above referred to.

ARTICLE 11.

Once the period of time fixed by the commission for the parties to make their decisions has expired, the commission shall set forth in a final act the decision of the parties, and if the conciliation has been effected, the terms of the settlement.

ARTICLE 12.

The obligations set forth in the second sentence of the first paragraph of Article 1 of the Treaty of Santiago de Chile of May 3, 1923, shall extend to the time when the final act referred to in the preceding Article is signed.

ARTICLE 13.

Once the procedure of conciliation is under way it shall be interrupted only by a direct settlement between the parties or by their agreement to accept absolutely the decision *ex aequo et bono* of an American chief of State, or to submit the controversy to arbitration or to an international Court.

ARTICLE 14.

When for any reason the Treaty of Santiago de Chile of May 3, 1923, does not apply, the commission referred to in Article 2 of this convention shall be organized to the end that it may exercise the conciliatory functions stipulated in this convention; the commission shall be organized in the same manner as that prescribed in Article 4 of said treaty.

In such cases, the commission thus organized shall be governed in its operation by the provisions, relative to conciliation, of this convention.

ARTICLE 15.

The provisions of the preceding Article shall also apply with regard to the Permanent Commissions constituted by the aforementioned Treaty of Santiago de Chile, to the end that said commissions may exercise the conciliatory functions prescribed in Article 3 of this convention.

ARTICLE 16.

The present convention shall be ratified by the high contracting parties in conformity with their respective constitutional procedures provided that they have previously ratified the Treaty of Santiago, Chile, of May 3, 1923.

The original convention and the instruments of ratification shall be deposited in the Ministry for Foreign Affairs of the Republic of Chile, which shall give notice of the ratifications through diplomatic channels to the other signatory Governments, and the convention shall enter into effect for the high contracting parties in the order that they deposit their ratifications.

This convention shall remain in force indefinitely, but it may be denounced by means of one year's previous notice, at the expiration of which it shall cease to be in force as regards the party denouncing the same, but shall remain in force as regards the other signatories. Notice of the denunciation shall be addressed to the Ministry for Foreign Affairs of the Republic of Chile which will transmit it for appropriate action to the other signatory Governments.

Any American State not a signatory of this convention may adhere to the same by transmitting the official instrument setting forth such adherence to the Ministry for Foreign Affairs of the Republic of Chile, which will notify the other high contracting parties thereof in the manner heretofore mentioned.

In witness whereof the above-mentioned plenipotentiaires have signed this convention in Spanish, English, Portuguese, and French, and hereunto affix their respective seals.

INTERNATIONAL LAW AND THE PROPERTY OF ALIENS

By ALEXANDER P. FACHIRI

THERE appeared under this title in the *British Year Book of International Law* for 1928 an interesting paper by Sir John Fischer Williams, K.C., which was, in part, a reply to an article of mine in an earlier issue of the same publication.¹ Controversy for its own sake is fruitless, and I should be loath to return to the charge were it not that the subject is of special moment at the present time, and the continued endeavour of lawyers to throw light upon it, each from his own point of view, may not be without value. The whole question of the property rights of foreigners under international law is being closely examined and canvassed from various angles. We are, in some sort, at the parting of the ways, when a final decision on one side or the other may soon become inevitable.² The movement towards expropriation on a large scale has received considerable impetus, and there is pressing need to determine what is, and what ought in future to be, the attitude of international law in the matter.

Before approaching the main question, it may be well to clear the ground of those existing disputes which, although related to the subject under discussion, do not raise the issue in its pure and simple form. As Sir John Fischer Williams very justly observes, in the conflicts arising out of the expropriation of the Hungarian optants, for instance, the main issue is not a general question of international law, but the interpretation of the Treaty of Trianon. If, as the Hungarians contend, Article 250 of the Treaty directly prohibits the expropriation in question, there is no need to decide the general question of international law.

That question, as stated by Sir John, is "whether or not, apart from any special terms imposed by a 'concession' or by a treaty, there exists a general rule that if a state expropriates the property of an alien without the payment of full compensation it commits a wrong of which the state of the alien affected is entitled to complain, even if the measure of expropriation applies indiscriminately to nationals and to aliens".

International law is not concerned, generally speaking, with the treatment accorded by a state to its subjects. It is, therefore, a question outside the purview of international law what a state does with their property. On the other hand, there can be no doubt, and

¹ *Year Book*, 1925, pp. 159-71.

² e.g. at the forthcoming Conference on the Codification of International Law.

it has not been disputed, that every state has the duty of protecting its own nationals abroad, and the corresponding right of taking such steps as may be necessary to carry out that duty. (It is universally admitted (and Sir John Fischer Williams, of course, does not dispute) that the rights in the enjoyment of which foreigners are entitled to claim the protection of their state include the rights to life and liberty, and in respect of violations of these rights it is no answer that nationals have been subjected to the same treatment.) Even the most uncompromising supporter of the doctrine of equality of treatment would hardly maintain that a state could escape responsibility upon this ground in the case, for instance, of a gross denial of justice, such as condemnation to death or a long term of imprisonment without allowing the defence any opportunity of being heard. In any event, such a contention would be clearly untenable in face of the precedents and the overwhelming weight of authoritative opinion to the contrary. To give another illustration, suppose that State A enacted a law providing that all children with red hair should be put into a lethal chamber when they reached a certain age, it would afford no answer to the protest of State B against the application of this law to its nationals that it was equally applicable and impartially applied to the nationals of State A.¹ And I conceive that the fact that the law in question was based upon a supposed doctrine of the science of eugenics could not be held to preclude intervention.

Thus, I do not think it can be doubted that there are certain fundamental rights, the violation of which in respect to aliens constitutes in itself, and without regard to the question of equality of treatment, an injury to the state of the alien for which that state is entitled to obtain redress. The reason for this rule is that international law has grown up among communities having a civilization, culture and moral conceptions of, more or less, the same kind, with certain basic ideas common to all, and, therefore, in their relations with one another civilized states are expected to conform to a certain standard of conduct.) One state, in dealing with the subjects of another, comes into relation with the latter and so commits a breach of international law if it falls below the accepted standard. The question in controversy really resolves itself into this: Are rights of property included among those fundamental rights with the respect of which international law is concerned?

¹ Another illustration is the "nationalization" of women, given by Mr. John P. Bullington in his valuable article in the *American Journal of International Law*, Vol. XXI, p. 685, to which I am much indebted.

Sir John Fischer Williams adopts the negative view and deals with a number of authorities bearing upon the matter. These I shall examine in a moment. But he also refers to the different views held at different periods and places upon the subject of private property, and to certain modern political and economic tendencies, and in this connexion I unreservedly recognize that rights of property cannot for our purpose be regarded as sacred and inviolable in the abstract without regard to existing conditions. The true question in dispute is a question of fact, namely *are* rights of property recognized by international law *to-day* as one of those fundamental rights of which we have been speaking?)

International Precedents.

Sir John briefly discusses the cases cited in my 1925 paper¹ and dismisses them as inconclusive, but I venture to refer to them once more as I still believe they go a long way to solve the problem. In addition, a number of other cases must be dealt with.

As regards, first of all, the *Sicilian Sulphur Monopoly*,² it is suggested that this case is not relevant because the British claim was based upon a treaty and because it was never submitted to a judicial or arbitral decision. But, as I pointed out in my previous article, the treaty provision mainly relied upon by Great Britain was Article V of the Treaty of 1816, which assured to British subjects the right of disposing of their personal property in any way without loss or hindrance. This provision, in my submission, is precisely one of those clauses inserted in international agreements at a period when the institutions and legal conceptions of modern civilization were not fully developed, and, later on, in treaties between states one at least of which was not thought to be highly organized, but which have now fallen into desuetude between civilized states *because* the safeguards stipulated for have become part of international common law.³ If this be so, the first criticism made as to the value of this case falls to the ground. With regard to the second, I submit that it is an erroneous method, when estimating the legal bearing of international precedents, to exclude cases dealt with diplomatically. Whilst such cases may not possess an authority equal to that of a judicial decision they afford valuable evidence of the practice of states, upon which international law is so largely built, and the pronouncements of responsible statesmen on matters

¹ *British Year Book*, pp. 163-9.

² *British State Papers*, Vol. XXVIII (1839-40), pp. 1163-1242; Vol. XXIX, pp. 175-204; Vol. XXX, pp. 111-20.

³ See *British Year Book*, 1925, pp. 169-70.

of international law made in the course of the negotiations can by no means be disregarded. As I pointed out before, the Sicilian Government expressly raised the arguments that foreigners were not entitled to better treatment than nationals, and must submit to the law of the land, and the British Government disputed these contentions on legal grounds. Inasmuch as the controversy resulted in the payment of compensation, awarded by an impartial commission, I submit that this case constitutes an authority in favour of the view I am advocating.

In order to preserve chronological order, I will mention here the case of Henry Savage,¹ which I omitted from my former article and which Sir John Fischer Williams cites and dismisses in a footnote. The facts were that the person named, an American citizen, imported into Salvador, in the year 1851, a quantity of gunpowder, which he deposited in the place designated for the purpose by the authorities. In March 1852, a Government decree was issued providing that at the expiration of six months the sale of gunpowder should become a state monopoly, and, in the meanwhile, the commodity must be stored at a distance from inhabited places and not sold in greater quantity than 12 lbs. The result of this decree was to make the sale of Mr. Savage's powder impossible. He offered it to the Government, without result, and ultimately they confiscated the property. Thereupon he claimed an indemnity upon the ground, *inter alia*, that the sequestration violated the Constitution of Salvador which provided that the property of individuals should not be taken for public purposes without previous payment of its value, and that American citizens were entitled to the protection of the Constitution under the Treaty of 1850 between the United States and Salvador, which provided that the citizens of each of the high contracting parties should have within the country of the other the power to engage in all kinds of trade, upon the same terms with the native citizens and enjoy all the rights and privileges in commerce which native citizens enjoy, submitting themselves to the laws there established to which native citizens are subjected. The United States subsequently took up the claim and after considerable negotiation the two Governments agreed to refer the case to arbitration. The commission of three so instituted ultimately awarded Mr. Savage \$4,497 compensation plus interest from December 10, 1852. Neither the agreement for reference nor the arbitral award have ever been published, but the correctness of the

¹ Moore's *International Arbitrations*, Vol. II, pp. 1855-7; De Lapradelle and Politis, Tome II, p. xii, footnote (1).

report in Moore's great work is not open to question, and in these circumstances there seems no sufficient reason to reject this authority. Its relevance is not impaired by the contentions advanced by the claimant, because the offending decree was equally applicable to natives as well as aliens and, therefore, the legal basis of the award cannot have been the Treaty of 1850. If it be suggested that the stipulation of the constitution was a determining factor, I would recall that most constitutions contain a similar provision. But it can hardly be supposed that such was the case, because international tribunals do not award compensation for breaches of municipal law alone. The only reasonable conclusion appears to be that the tribunal regarded the confiscation as contrary to international law. >

The case of the *Rev. Jonas King* whose land was seized by the Greek Government in 1853¹ is, admittedly, of limited application to the present question inasmuch as the matter complained of was an isolated administrative act, not general legislation, but I venture to repeat that the fact that the United States intervened and obtained compensation for their subject shows that confiscation of the property of aliens gives rise to a claim at international law. The brief account of the proceedings contains no hint that the American claim was based on discrimination. True it is, as Sir John observes, that this case figures in Moore's *Digest* under the rubric "Denial of Justice", but this supports my thesis, rather than the reverse, for it shows that injuries relating to property can be so regarded.

The somewhat, though not entirely, similar case of *George Finlay*,² a British subject, whose land was taken without payment for the garden of the King of Greece's palace in 1836, also merits attention. It appears from the diplomatic correspondence that, although Mr. Finlay asserted that the seizure of his land was a mere arbitrary act of a despotic sovereign, the Greek Government claimed that it came under the head of appropriation for purposes of public utility. Moreover, other persons, both natives and foreigners, had suffered in a similar manner, and it was nowhere alleged that Mr. Finlay's claim was in any degree based on discrimination. The following passages from the dispatch of Lord Palmerston to Sir Edmund Lyons (British Envoy at Athens), dated August 7, 1846, are distinctly relevant:

"In all countries it is understood that when land belonging to a private individual is required for purposes of great public utility or of national defence,

¹ Moore's *Digest*, Vol. VI, pp. 262-4.

² *British State Papers* (1849-50), Vol. XXXIX, pp. 410-79, 904, 906.

private rights must so far yield to public interest, that the individual is compelled by law to give up his land to the public, provided always that he shall receive for it from the public its full and fair value. . . . Mr. Colletti (the Greek Minister for Foreign Affairs), indeed, has tendered to Mr. Finlay an entirely inadequate compensation, alleging that it is calculated at the same rate as that which has been offered to and accepted by other persons, both Greeks and foreigners, who were deprived of their land at the same time and under the same circumstances as Mr. Finlay. But even supposing that those other persons have all accepted the compensation so tendered to them . . . H.M. Government have to observe, that such compensation was calculated . . . without the concurrence of Mr. Finlay, the injured party, and it is manifestly below the real value of the property which was taken from him; and when the question is whether a British subject in a foreign country shall or shall not be compelled to accept an inadequate compensation for an act of injustice by which he has suffered, the British Government can pay no attention to the argument, that compensations equally inadequate have been accepted by nationals or by subjects of other states, for similar injuries sustained by them."¹

Ultimately, the Greek Government consented to refer the claim to arbitration for the purpose of determining the value of the land at the time of its seizure, plus interest from the date of seizure till that of payment,² and a sum of 30,000 drachmas was duly paid to, and accepted by, Mr. Finlay in satisfaction of his claim.

The next case is that of the *Delagoa Bay Railway Arbitration of 1900*, which Sir John Fischer Williams dismisses on the ground that the main issue was the legitimacy or otherwise of the cancellation of a railway concession; but I showed in my previous article that the confiscation of the line and materials was expressly raised as a distinct point in the claim and specified in the *compromis* as one of the matters in respect of which the amount of compensation was to be determined.³ To that extent, this case represents an example of a full blown international arbitration in which the principle was formally conceded by the respondent Government that compensation is due for the confiscation by Government decree, passed in due form, of tangible⁴ property belonging to aliens. I agree that the precedent is not conclusive because it was not a case of general legislation, but, like the case of Mr. Jonas King, it affords authority for the simple proposition that the confiscation of alien property is contrary to international law.

With regard to the case of the *Portuguese Religious Properties* to which I attached, and still attach, great importance, Sir John

¹ *Ibid.*, pp. 431-2.

² See *ibid.*, p. 467.

³ See *British State Papers* (1888-9), Vol. LXXXI, p. 691; Sentence finale du Tribunal de Delagoa, p. 89.

⁴ I willingly adopt this term (and "physical" which is used in the American cases) as preferable to "specific", which I used in my previous article.

Fischer Williams concedes that it "came nearer" to raising the issue now under discussion, but adds that "it does not appear that the case was intended to be argued on the footing that the action taken applied equally to foreigners and nationals, and in any event the matter was compromised". I cannot follow the first part of this criticism, which is contrary to the available evidence. The dispute arose out of expropriation by a Portuguese law of general application, and the *compromis* of July 31, 1913, contained no restriction, providing, as it did, for an arbitral decision based upon "the conventional law,¹ if any, applicable, and in default thereof according to the dispositions and general principles of law and equity"—a common formula in international proceedings of a judicial character. The written procedure was conducted in view of this situation, and expressly raised the question of equality of treatment in the application of the legislation complained of, as appears from the quotations contained in my previous article. The plaintiff Governments maintained *in terms* that (the expropriation without compensation of the property of their nationals was contrary to international law notwithstanding that the same measure was equally applicable to Portuguese subjects and this was the principle which the Portuguese Government expressly approved and endorsed in its reply.²

It is true that in 1920 (the further progress of the proceedings having been interrupted by the war) an understanding was reached between the parties whereby the tribunal was to "have complete freedom in settling, according to equity and by a single judgment, or several judgments, the claims which form the object of the arbitration".³ This compromise evidently had reference to the point that was in dispute, namely, the Portuguese contention that the individual claimants were not the true legal owners of the expropriated properties, and the Tribunal made awards granting compensation to the claimants on equitable grounds without deciding the legal question of ownership.⁴ I submit that in these circumstances it is impossible to set aside the authority of this case. The point which I emphasize is that at a time when the proceedings were being conducted upon a strictly legal basis, the precise view for which I am contending was advanced by the one side and accepted by the other. This admission possesses in itself con-

¹ Throughout the arbitral proceedings it was common ground that no relevant treaty existed.

² See *British Year Book of International Law*, 1925, pp. 168-9.

³ See Awards, published by the Carnegie Endowment, Washington, 1921.

⁴ *Ibid.*

siderable legal value, but when it is followed by an award granting compensation I submit that the effect of the precedent is incontestable, and no less so because with regard to another disputed matter the award was based on an amicable compromise.

Next comes the *Italian Insurance Monopoly* which Sir John regards as more important. However that may be, I do not think this case militates against my view. As I pointed out before, the Italian law of 1912 did not dispossess the owners of any tangible property. Sir John appears to consider that there is no distinction to be drawn between such property and the goodwill of a business, but I suggest that the distinction is recognized and given effect to by high judicial authorities. In the United States, for example, it is an accepted doctrine that loss of goodwill is not taken into account in awarding compensation for exercise of the right of eminent domain,¹ and the following observations by that great jurist O. W. Holmes, then Chief Justice of Massachusetts, illustrate how the distinction between the two kinds of property is put:

"It generally has been assumed, we think, that injury to a business is not an appropriation of property which must be paid for (under the Constitution). . . . No doubt a business may be property in a broad sense of the word, and property of great value. . . . But a business is less tangible in nature and more uncertain in its vicissitudes than the rights which the Constitution undertakes absolutely to protect. It seems to us, in like manner, that the diminution of its value is a vaguer injury than the taking or appropriation with which the Constitution deals. A business might be destroyed by the construction of a more popular street into which travel was directed, as well as by competition, but there would be as little claim in the one case as in the other. It seems to us that the case stands no differently when the business is destroyed by taking the land on which it was carried on, except so far as it may have enhanced the value of the land." ²

In England, where loss of goodwill is compensated on compulsory acquisition of land, the existence of the distinction in question is nevertheless recognized in some of the cases.³ I do not want to be understood as asserting that in the United States compensation is not under certain circumstances awarded for loss of goodwill,⁴ or as defending the principles adopted in those cases where it is withheld. All I am concerned with, at the moment, is the point that confiscation of physical property can, juridically, be distinguished from the

¹ See *Banner Milling Co. v. State of N.Y.* (1925) 240 N.Y. 533; *Becker v. Phila. & Reading R.R.* [1896] 177 Pa. 252, pp. 258-9.

² *Sawyer v. Commonwealth* [1902] 182 Mass. 245 at p. 247.

³ See *Ricket v. Metro. Rly.* [1867] 2 H.L. 175; *Metro. Water Board v. McCarthy* [1874] 7 H.L. 243.

⁴ See *City of Omaha v. Omaha Water Co.* [1910] 218 U.S. 180; *City of Denver v. Denver Water Co.* [1918] 246 U.S. 178.

appropriation and destruction of a business with its goodwill. To return to the Italian Insurance law, the facts were, first, that no loss was even indirectly caused to the foreign companies in respect of their physical assets because, as the Italian note¹ points out, the value of immovable property had risen since they originally acquired it and they could therefore dispose of it at a profit, and, secondly, that as a result of the protests of the interested Powers amendments were made to enable foreign (as well as Italian) companies to continue business for ten years, subject to certain conditions.² The question naturally occurs to one's mind: Why was this concession made if the original proposal for an immediate and unconditional monopoly was unobjectionable?

As Sir John himself points out, in the case of the similar and contemporaneous move made by the Government of Uruguay the protests of Great Britain and France resulted in the abandonment of the proposed measure,³ and the grounds for the British representations which he cites⁴ are certainly not inconsistent with the view I am defending.

The *Norwegian Ships Arbitration* held in 1921 between the United States and Norway, of which I was not cognizant when I wrote my last article, appears to me to be of great importance. The dispute arose out of the shipping requisitions carried out by the United States Government in 1917 upon their entry into the war. The claims of certain Norwegian nationals affected by these measures were taken up by their Government and after diplomatic negotiation a *compromis* was signed on June 30, 1921, whereby the United States and Norway referred the matter to the Permanent Court of Arbitration at The Hague. The terms of reference were of the widest possible character, providing that the Tribunal "shall examine and decide the aforesaid claims in accordance with the principles of law and equity, and determine what sum, if any, shall be paid in settlement of each case".⁵ Claims were filed by Norway amounting to about \$18,000,000, inclusive of interest, in respect of fifteen claimants. In reply the United States declared its willingness and desire to make just compensation for the property taken and recognized its liability to make compensation to the amount of \$2,679,220 in respect of the fifteen claims.

¹ See *British Year Book*, 1925, p. 167.

² See text of law in *Revue Gén. de Droit International Public*, Vol. XX (1913), p. 5.

³ See Borchard, *Diplomatic Protection*, p. 126, footnote 1.

⁴ *British Year Book*, 1928, p. 4.

⁵ See *Proceedings of the Tribunal*, The Hague, 1922. The award is also printed in *American Journal of International Law*, Vol. XVII, p. 362.

The requisitions had been carried out in pursuance of duly enacted legislation of a perfectly general character, which *ex facie* applied equally to American and foreign shipowners, and provided in all cases for the payment of just compensation. Whatever may have been the position in regard to native shipowners, the Norwegian claimants had not at the date of the arbitration proceedings received any compensation. Discrimination was not, however, relied upon by Norway, nor, on the other hand, was equality of treatment pleaded by the United States. The attitude taken up by the latter Government was that "just compensation" was due as a matter of right, apart from any question as to the treatment accorded to their own nationals. They contended, however, that "just compensation" was to be determined solely in accordance with the municipal law of the United States and that under that law and upon their view of the effect of the requisitions the amount offered was sufficient. It will be seen, therefore, that although the issue which forms the subject of the present discussion was not directly raised, yet the questions involved have a very close bearing upon that issue. There is an obvious relation between the two propositions:—"I recognize the obligation to pay you compensation, but that compensation is measured by my own law," and "You are only entitled to the same treatment as my own nationals under my own law".

The Tribunal in dealing with the law governing the arbitration observe that

"should the public law of one of the parties seem contrary to international public policy (*ordre public international*) an international tribunal is not bound by the municipal law of the states which are parties to the arbitration."¹ And a little later they make the following pronouncement: "The Tribunal cannot ignore the municipal law of the parties, unless that law is contrary to the principle of the equality of the parties, or to the principles of justice which are common to all civilized nations. But the Tribunal is not bound by special rules instituted in any of the two countries for the purpose of restricting (for instance in favour of the sovereign against its own 'justiciables') the equality between parties which would otherwise be the basis of justice as between private litigants.

"The Tribunal cannot agree, therefore, with the contention of Norway that it should be entirely free to disregard the municipal law of the United States, when this has been implicitly accepted by Norwegian citizens in their dealings with American citizens, although this law may be less favourable to their present claims than the municipal laws of certain other countries.

"But the Tribunal cannot agree, on the other hand, with the contention of the United States, that it should be governed by American Statutes whenever the United States claims jurisdiction.

¹ *Proceedings of the Tribunal*, p. 140.

"This Tribunal is at liberty to examine if these Statutes are consistent with the equality of the two Contracting Parties, with treaties passed by the United States, or with well established principles of international law, including the customary law and practice of judges in other international courts."¹

The award then states that after careful examination the Tribunal agrees with the contention of the United States that there was nothing in the emergency legislation under which the requisitions were made that was contrary to international law, and cites the Fifth Amendment of the American Constitution which provides that "no person shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation".

"It is common ground (states the Tribunal) "that in this respect the *public law of the parties is in complete accord with the international public law of all civilized countries*".²

The Tribunal proceeds to consider and dismiss the American argument that the claimants contractual rights and interests (as opposed to physical property) were not "taken" in the constitutional sense, however much depreciated in value, and that this was a case of mere consequential damages, which are not awarded in the United States. They hold that the cancellation of these rights is equivalent to the taking of private property as defined by the Fifth Amendment and "just compensation is due to the claimants under the municipal law of the United States, *as well as under international law, based upon the respect for private property*."³

Another reason advanced by the United States for the purpose of limiting the amount of compensation to the value of the physical property taken, and excluding the contractual rights appropriated, was that there could be no liability, and therefore no compensation, when the contract had been destroyed or rendered void in consequence of "restraint of princes" (viz. that exercised by the American Government). To this the Tribunal replies that

"although 'restraint of princes' may well be invoked in disputes between private citizens, it cannot be invoked by the United States against the Kingdom of Norway in defence to the claim of Norway. International law and practice are based upon the principle of equality between states. *No state can exercise towards the citizens of another civilized state the 'power of eminent domain' without respecting the property of such foreign citizens or without paying just compensation as determined by an impartial tribunal, if necessary*."⁴

In the result the Tribunal awarded sums totalling approximately \$12,000,000, representing the fair market value of the

¹ *Proceedings of the Tribunal*, pp. 141-2.

² *Ibid.*, p. 142.

³ *Ibid.*, pp. 145-6.

⁴ *Ibid.*, pp. 150-1.

property at the time of its appropriation plus interest, in respect of the fifteen claims.

I submit that, although the question of the right of a state to legislate on equal terms for aliens and nationals in respect of expropriation was not expressly raised in this arbitration, it is quite clear that if the Tribunal had come to the conclusion that the American law did, in fact, provide for the expropriation of the Norwegian claimants' property without payment of just compensation they would have awarded such compensation notwithstanding that the law applied equally to American nationals. This follows from the whole of the reasoning indicated above.

We now come to the recent case relating to the *Chorzow Factory in Upper Silesia*¹ decided by the Permanent Court of International Justice, to which, as Sir John Fischer Williams states, jurists have attached great weight in connexion with the present question,² but which he himself considers not to be an authority in favour of the existence of the general rule under discussion. It is quite true that the issue depended upon a treaty—the Geneva Convention of 1922 between Poland and Germany. Poland had enacted legislation which cancelled the titles to certain property in Upper Silesia, transferring them to the Polish Treasury, and the question before the Court was whether the application of this law to the Chorzow Factory belonging to two German companies, was or was not contrary to Article 6 of the Convention. The Court decided in the affirmative. Article 6 provided as follows:

“Poland may expropriate in Polish Upper Silesia, in conformity with the provisions of Articles 7 to 23, undertakings belonging to the category of major industries including mineral deposits and rural estates. Except as provided in these clauses, the property, rights and interests of German nationals or of companies controlled by German nationals may not be liquidated in Polish Upper Silesia.”

In construing this provision, the Judgment says this:

“Having regard to the context, it seems reasonable to suppose that the intention was, bearing in mind the régime of liquidation instituted by the peace treaties of 1919, to convey the meaning that, subject to the provisions authorizing expropriation, the treatment accorded to German private property, rights and interests in Polish Upper Silesia is to be the treatment recognized by the generally accepted principles of international law. However that may be, it is certain that expropriation is only lawful in the cases and under the conditions provided for in Article 7 and the following articles; apart from these cases, or if these conditions are absent, expropriation is unlawful.

¹ Judgments Nos. 7 & 8 *Series A.*, Nos. 7 & 9, of the *Publications of the Court*.

² See Prof. Gidel in *Revue Générale de Droit International Public*, Jan./Feb. 1927.

"Further, there can be no doubt that the expropriation allowed under Head III of the Convention is a derogation from the rules generally applied in regard to the treatment of foreigners and the principle of respect for vested rights. As this derogation itself is strictly in the nature of an exception, it is permissible to conclude that no further derogation is allowed. Any measure affecting the property, rights and interests of German subjects covered by Head III of the Convention, which is not justified on special grounds taking precedence over the Convention, and which oversteps the limits set by the generally accepted principles of international law, is therefore incompatible with the régime established under the Convention. The legal designation applied by one or other of the interested Parties to the act in dispute is irrelevant if the measure in fact affects German nationals in a manner contrary to the principles enunciated above.

"It follows from these same principles that the only measures prohibited are those which generally accepted international law does not sanction in respect of foreigners; expropriation for reasons of public utility, judicial liquidation and similar measures are not affected by the Convention."¹

Now I submit that this pronouncement is not a mere *obiter dictum* but part of the reasoning whereby the Court reached its decision. In any event it shows that the Court holds the view that international law does include a rule prohibiting the confiscation of the private property of aliens. Sir John Fischer Williams argues that this statement of the Court must be read *secundum materiam*, and cannot be prayed in aid of the proposition that general legislation which confiscates the property of aliens on equal terms with natives is contrary to international law, but it is noteworthy that it was part of Poland's case in these very proceedings that the Polish law complained of applied irrespective of the nationality of the owner.² In this connexion, the Court observed that:

"Even if it were proved—a point which the Court does not think it necessary to consider—that, in actual fact, the law applies equally to Polish and German nationals, it would by no means follow that the abrogation of private rights effected by it in respect of German nationals would not be contrary to Head III of the Geneva Convention. Expropriation without indemnity is certainly contrary to Head III of the Convention; and a measure prohibited by the Convention cannot become lawful under this instrument by reason of the fact that the state applies it to its own nationals."

By parity of reason the result would be the same, if the prohibition against the expropriation without indemnity of alien property arose from international law.

Before leaving this case, I would add that although I am in agreement with much of what Sir John says as to the application of judicial precedents I do not think too narrow and technical a standard should be adopted in using international decisions.

¹ Judgment No. 7, pp. 21–2.

² *Ibid.*, p. 31.

By all means let us avoid loose generalization from isolated *dicta*, but I respectfully submit that it is idle to suggest that Judgment No. 7 affords no authority for the proposition I am defending. But even if it be not, as I think it is, a precedent in point, it undoubtedly shows how the Permanent Court would approach the question if it arose directly before them.

One more incident—of a different sort—may be conveniently added to the list of international precedents, namely, the action taken by the Powers after the outbreak of the Bolshevik Revolution in Russia. In February, 1918, Mr. Francis, Ambassador of the United States and doyen of the diplomatic corps in Petrograd, presented to the Russian Ministry of Foreign Affairs the following Note on behalf of the United States and all the other states, allied and neutral, diplomatically represented in Russia:

“In order to avoid misunderstanding in the future, the representatives at Petrograd of all the foreign Powers declare that they consider the decrees relating to the repudiation of Russian State loans, *the confiscation of property of all sorts* and the analogous measures as without effect in so far as their nationals are concerned, and the said representatives reserve the right to claim at the desired moment from the Russian Government damages for all the losses which these decrees may entail for their nationals.”¹

Without placing undue emphasis upon a step of this nature it may be remarked that it can hardly be supposed that the accredited representatives of the greater part of the community of nations would have placed on record this formal claim unless they believed it had some legal basis, and yet we all know that nothing could be more general than the confiscatory decrees of the Soviet Government.

As against the foregoing precedents,² Sir John is only in a position to cite two international cases, neither of which, as he quite fairly admits, can be regarded as authorities for his view. The first is the *Arbitration between the Reparation Commission and the United States*³ where the question in issue was the claim of the Standard Oil Company to be the “beneficial owner” of eight tankers belonging to a German corporation with the result that the vessels should not, in the Company’s contention, be regarded as the property of German nationals within Annex III to Part VIII of the Treaty of Versailles. It is difficult to see how any observations in an award dealing with this question could affect the point

¹ *Clunet*, Vol. XLV, p. 982.

² I do not, of course, claim to have exhausted the list of relevant precedents.

³ Reported in *British Year Book of International Law*, 1927, p. 156.

we are discussing. Those cited by Sir John contain a few sentences enunciating the principle that, provided there is no discrimination against them, foreigners must submit to the laws of the country where they reside or have invested their capital. Speaking generally, this is true not only as to property but in all other respects, and carries us no farther in ascertaining whether compensation is due for confiscation of alien property as for the violation of other fundamental rights of foreigners.

The other is the *Cadenhead* case,¹ where the claim that was being arbitrated was in respect of the accidental killing of a British subject by an American sentinel. In adjudicating upon this claim the American and British Pecuniary Claims Tribunal remarked that:

"It has not been shown that there was a denial of justice, or that there were any special circumstances or grounds of exception to the generally recognized rule of international law that a foreigner within the United States is subject to its public law, and has no greater right than a national of that country."

This throws no light whatever upon the present issue, because the crucial point is precisely whether confiscation of alien property is a "special circumstance or ground of exception" analogous to a denial of justice.

I submit that it is a highly significant fact that, as against the precedents I have adduced on the one side, those are the only precedents which research and high ability have been able to unearth upon the other.

By way of conclusion to this part of my review, I respectfully maintain that international practice and arbitral decisions indisputably establish the proposition that the confiscation of the tangible² property of foreigners is, in itself, a matter giving rise to a claim at international law, and further, that it is a reasonable conclusion to be drawn from the precedents that the fact that the confiscation is effected by means of general legislation applicable equally to nationals of the enacting state does not afford an answer to an international claim.

Towards the end of his review of authorities Sir John adverts to the report on "the responsibility of states for damage done in their territories to the person or property of foreigners"³ drawn up

¹ *American Journal of International Law* (1914), Vol. VIII, p. 663.

² In limiting the proposition to tangible property I do not mean to imply that the same may not be true of other kinds of property.

³ *American Journal of International Law*, Vol. XX (Special Codification Supplement), p. 176.

by a sub-committee of the Committee of Experts appointed by the League of Nations to study the question of the codification of international law. It is clear that the authors of the report regard the right of property as one of the fundamental rights recognized by international law, for they say that:

"Some rights are not rights created by states for the benefit of their nationals or of foreigners, namely, the right to life, the right to liberty and the right to own property. The community has simply recognized the existence of these rights and states have mutually undertaken to ensure the possibility of enjoying them. In fact, wherever a man goes he takes his rights with him, and wherever he is, it is the will of all states that these rights should be safeguarded."¹

On the other hand, under the rubric "treatment", which follows immediately after, it is stated:

"Here also the will of the community of peoples is clearly defined. It accepts the above-mentioned rights as being the minimum which a state should accord to foreigners in its territory, but it does not thereby recognize the right to claim for the foreigner more favourable treatment than is accorded to nationals. The maximum that may be claimed for foreigners is civil equality with nationals."²

Does this qualify all that follows? I rather think not, although the point is not absolutely clear. My impression is that the purpose of the above passage is to exclude the conclusion that the existence of these fundamental rights, *ipso facto* involves the duty of according in advance special legal guarantees to foreigners. For when dealing specifically with international responsibility the report observes that:

"This attaches when the state commits an unlawful act, contrary to international law, if, for instance, by a national law it declares property owned by foreigners in its territory to be state property, without granting any compensation."³

This proposition is perfectly general, and the sentences that follow suggest that it is intended to be absolute, irrespective of the question of equality, because the report goes on to say that in the case put

"this state has failed to fulfil an obligation which it voluntarily and freely assumed as a member of the international community—the obligation to accord to the individual certain rights, including the means of defending these rights. The state of which that individual is a national is wronged in the first case (confiscation of property) by an act contrary to international law."⁴

Another statement of the same sort occurs later on,⁵ and the "conclusions" of the report contain no reference whatever to equality of treatment. On the whole, I am inclined to think that

¹ *Ibid.*, p. 182.

² *Ibid.*, p. 182.

³ *Ibid.*, p. 183.

⁴ *Ibid.*, pp. 183–4.

⁵ *Ibid.*, p. 197.

the intention of the report is to hold that confiscation of the property of aliens engages the responsibility of the state irrespective of whether the measure applies equally to natives. In any event, the position taken up with regard to the nature of property rights strongly supports my view. But it is only right to point out that the authority of the document is of a limited character—in effect, it represents only the opinion of the two jurists who drew it up. The Committee of Experts as a whole expressly states that it “does not pronounce either for or against the principles of responsibility set out in the report”,¹ and, of course, those principles have not (up to the present) been adopted either by the League of Nations or an international conference.

It is unnecessary to discuss the resolution² of the Institute of International Law upon the same subject, adopted at Lausanne on August 31, 1927. I agree that Article 1 in declaring that “the state is responsible for damage caused to foreigners by any act or omission contrary to its international obligations whatever be the state authority—constituent, legislative, governmental or judicial—from which it proceeds” leaves the present question open.

The resolutions adopted by the International Law Association at Vienna on August 9, 1926, on the other hand, are in point. On consideration of a report on the Protection of Private Property³ and after considerable discussion, the conference resolved as follows:

“1. It is generally recognized by the constitutions, civil codes or common law of civilized states that private property may not be expropriated without compensation.

“2. In so far as the question of immunity of private property from confiscation arises in international relations the same principle is generally accepted.

“3. A state is by the Law of Nations entitled to intervene to protect its nationals in another state: (a) from injury to their property resulting from measures which discriminate between them and the nationals of such other state, (b) from actual injustice even if there is no such discrimination.

“4. It is contrary to the principles of International Law to deprive a foreigner . . . of the fundamental rights to which he is entitled as owner through indirect ways which, though not in law, but in fact, lead to an expropriation without compensation.”⁴

Principles.

Under this heading Sir John Fischer Williams first advances an ingenious argument based on considerations of fact. He says:

¹ *American Journal of International Law*, Vol. XX (Special Codification Supplement), p. 177.

² *Annuaire de l'Institut de Droit Int.*, 1927, Tome III, p. 330.

³ International Law Association, 34th Report, p. 227.

⁴ *Ibid.*, p. 248.

Here is a piece of English land belonging to a British subject. Clearly the British Parliament can expropriate him as it pleases. He sells the land to an alien. How has Parliament lost a portion of its former power? He points out that there has been no written international engagement so limiting the authority of Parliament and concludes that it is reasonable to ask for clear evidence of the establishment of such a doctrine by deliberate assent of the international *persona* as a whole.

My answer is this: First of all, the problem is not, with all respect, correctly stated. There is no question of the loss of a pre-existing power by the legislature, for it has never been suggested that international law could override the measure expropriating the property. Nothing could prevent the measure being carried into operation. All that would happen, if my view is well founded, is that the Government would be bound, upon a claim being duly made by the state of the dispossessed alien, to pay compensation. With regard to the question of evidence, I agree that the existence of this doctrine must be proved, just as every customary rule of international law must be proved, but I submit that there is no reason to require evidence of a different kind from that required in the case of any other such rule, and my submission is, of course, that the precedents cited above, coupled with the other evidence of the way civilized states regard rights of property, are sufficient for this purpose. Sir John says this doctrine is exceptional. That might be so if its effect was what he suggests, but the doctrine I am defending does not involve any greater limitation of sovereignty than many other undoubted rules of international law. As I have shown, it does not, as he alleges, involve the loss "of a right to regulate the destination of a parcel of territory", but the obligation to make compensation in respect of the appropriation thereof. There is nothing exceptional in the fact of international law attaching such an obligation to an act of domestic legislation. The same "limitation" is imposed whenever such an act is regarded as wrongful by international law.

The real question comes down, once more, to whether the right of property is recognized by civilized mankind as a fundamental right. If so the supposed impossibility of presuming the existence of the rule in dispute disappears. On this hypothesis, it is quite natural that the members of the community of nations should have implicitly assented to make reparation for violation of this right as regards each other absolutely, just as in the case of the violation of other fundamental rights.

Sir John recognizes the fact, which is relied upon by advocates of the rule, that respect for private property is guaranteed by the constitutional law of most states, but asks by what process of reasoning this limitation of municipal law can be transformed into an international duty. Again, I do not think this is the way those who support the doctrine in controversy put their case. I quite agree that, if they did, it would be fallacious. The true view in my submission is that the constitutional provisions in question¹ are evidence (and weighty evidence) of the fact that states do regard the right of property as fundamental. It is obvious that constitutions can be amended, and if amendments were generally introduced withdrawing the protection accorded to private property that would undoubtedly afford evidence that the right was no longer so regarded. On the other hand, if the doctrine is at the present time part of international law it is clear that a state cannot divest itself of its international responsibility merely by altering its municipal law.

We therefore come back to what Sir John truly describes as the ultimate point of principle. Is the right of property to be regarded as "fundamental"? I submit that the real problem is not one of philosophy or of economic theory, but of fact. The material question for our purpose is not whether the right of property can be justified in the abstract, but whether or not it is, at the present time, considered by civilized mankind generally as in the same category as the other rights described as fundamental; the rights to life and liberty. I believe it is, and I rely upon the evidence afforded by the international precedents as well as by the constitutional laws and practice of civilized nations. As against this there is, as we have seen, substantially no evidence of an international character, so that the other scale is, I submit, heavily weighted in my favour. Sir John relies upon certain developments in internal administration and law, which I shall discuss in a moment, but he alludes incidentally to the modern growth of socialist doctrines, and in this connexion it is not uninteresting to remember that the responsible leaders of the Socialist party in England, and I believe the same is true of most other countries, disclaim the intention of expropriating private property without compensation. So far as I know it is only in Soviet Russia that confiscation is openly defended in principle and carried out in practice. The isolated departures from the rule of respect for

¹ They are conveniently collected in the 34th *Report of the International Law Association*, pp. 227-33, and *American Journal of International Law*, Vol. XXI, p. 527.

private property which have occurred in other countries are admittedly exceptional and cannot afford evidence of a change of attitude on the part of civilized states generally.

A number of reasons, largely political, are advanced why international law *ought* not to protect private property. I do not think it is necessary to comment upon them. It is a matter of opinion. Personally, I see no serious inconvenience in a rule which whilst imposing the obligation of compensating dispossessed foreigners leaves the state free to expropriate such property as it deems necessary for its welfare.

But it is needful to deal with certain indirect measures in the domestic sphere which are said to show that even the most highly civilized states do not treat private property as sacred. Sir John mentions, firstly, the issue of paper money in such quantity as virtually to destroy the public debt, and cites a case in the German Supreme Court where the claim of foreign holders of pre-war German loans to payment of interest in reichsmarks, instead of paper marks, was rejected.¹ Here (he says) there is actual confiscation but admittedly no remedy, either at international or municipal law. I agree that there is no remedy for the reason indicated in the case cited, namely, that where a contract is made for payment in a particular currency the rights of the payee are measured in that currency. This is necessarily so as a matter of law and also of ordinary business. True that great hardship may result if a Government, either from necessity or otherwise, abuses its power to issue paper currency, but the loss is a business loss which the lender must have known (if he thought of the matter) to be a possible result, however remote, of the transaction. The loss may be as great as in the case of direct confiscation of physical property, but the two things are not the same. No one has ever suggested that international law guarantees foreigners against losses of all kinds.

The second argument is based upon the American doctrine of "police power". Sir John emphasizes the elasticity of this doctrine and concludes that it virtually enables the state in any given case to escape from the consequences of the constitutional restrictions imposed upon it in dealing with private property. Three recent decisions of the Supreme Court are cited, presumably because they constitute the high-water mark of the doctrine's application. In *Louisville and Nashville Railroad Co. v. Mottley* [1911] 219 U.S. 467, the Court held that an Act of Congress providing that carriers

¹ *Giulini v. The Reich*, Reichsgericht IV 359/26, Jan. 27, 1927.

must not charge different rates from those specified in their published tariffs cancelled the right of an individual to free passes granted as compensation for injuries under a pre-existing contract, and was constitutionally valid. The ground of the decision was that when the contract was made it was necessarily subject to the possibility of Congress exerting its power of regulating interstate commerce in such a way as to render the agreement unenforceable. The Court observed that there was no taking of property within the Fifth Amendment of the Constitution. In *Reinman v. City of Little Rock* [1915] 237 U.S. 171 the question was as to the validity of a municipal ordinance prohibiting the business of livery stables from being conducted in certain defined portions of the city, as a result of which the defendants alleged they would suffer loss and damage. It was not suggested that this prohibition was contrary to the Fifth Amendment. There was no dispute but that the regulation of livery stables in a thickly populated city was within the police power to legislate for the public health and welfare, and the point in dispute, answered by the Court in the affirmative, was as to whether this power was exercised, as regards the defendant, reasonably and without unjust discrimination. In *Village of Euclid v. Ambler Realty Co.* [1926] 272 U.S. 365, the Court affirmed the validity of a zoning ordinance restricting and classifying the types of building permitted to be erected on unbuilt land. Here again the appellant, who was an owner of a tract of land subject to the ordinance, did not (and obviously could not) contend that the measure offended against the Fifth Amendment, but relied upon the Fourteenth Amendment, whereby no man is to be deprived of liberty or property without due process of law, or denied the equal protection of the law.

These cases do not touch the point under discussion, because I do not claim that consequential damage of this kind comes within the international rule. It is clear that under the same American doctrine the state cannot evade the payment of compensation where physical property is appropriated. This is expressly decided in an authoritative case before the N.Y. Court of Appeals¹ where a legitimate exercise of the police power in relation to the public health, which entailed the laying of drains in the respondent's land, was held to involve the obligation of making just compensation for the land so used. Earl J. observed in the course of the judgment that "the interference with property under the police power may be justified in most cases by the application of the

¹ *Cheesebrough* [1879] 78 N.Y. 232.

principle that one so shall use his own property as not to injure or endanger the property or health, or disturb unnecessarily the peace or comfort of his neighbour.¹ But there never can be any necessity under the police power or the law of necessity permanently to appropriate land to public use without compensation.”²

Sir John Fischer Williams asks how the line is to be drawn between, for example, the suppression of the liquor traffic in virtue of police power and the confiscation of large landed estates. The Government, equally in both cases, may *bona fide* hold that the measure is advisable or necessary for the social welfare of the community. If, according to the American view, no compensation is payable in the first case why should it be in the second? Upon the hypothesis that the American view is here in accordance with international law I submit that, whatever the purely logical difficulties may be, the distinction exists as a matter both of common sense and of law. It is a question of applying a legal rule to concrete facts, in doing which matters of degree and practical result must be weighed and determined. This is the every-day task of the courts administering municipal law and by no means foreign to, or beyond the capacity of, international tribunals. Obviously, the Supreme Court of the United States would not listen for a moment to the argument alluded to above. They would necessarily hold that the law depriving American citizens of their land, although described as an exercise of “police power”, offended against the Fifth Amendment in so far as it denied just compensation. Similarly, assuming that the rule of international law which I uphold does exist, an international court would have no difficulty in deciding that the state in question was bound to pay compensation for the confiscated land in so far as it was taken from foreigners. Perhaps it will be objected on the other side that I have evaded the real point, which is, that in the absence of a positive, written rule, such as that contained in the American Constitution, the doctrine of police power shows that there is no logical basis for an international rule limited to direct confiscation of physical property. My answer is that the existence of a customary rule of international law is not a question of logic, but of fact. Upon the evidence I maintain that the rule extends at least as far as that, and it does not appear to me inherently contrary to justice or good sense that the members of the international society

¹ The same ground is assigned in the modern decisions. See *Euclid v. Ambler Co.*, *supra*, at p. 387.

² 78 N.Y. at p. 237.

should have accepted a certain limitation of their sovereignty without carrying that limitation to its logical conclusion.

Finally, the power of taxation is referred to as a means of arriving at results indistinguishable from confiscation without the possibility of legal international objection. Here, again, practical considerations are important. Generally speaking, taxation is distinguishable from expropriation amongst other things in this, that the latter is in substance retroactive in its results, whereas the former is not. If the Government seizes my land, or my savings at the bank, it deprives me, once for all, of pre-existing property, without the possibility of my making good the loss. On the other hand, an income tax, death duties, even a capital levy are prospective in operation, and provided the rate is not too high, can be balanced by saving and insurance. It is, of course, true that taxation could be imposed at such a rate and in such a manner as to be equivalent to confiscation. The results would tend to approximate in proportion as the rate approached 100 per cent. It is, once more, a question of degree and fact, and inasmuch as, in international law, it is the substance of a measure, and not its name, that matters I submit that confiscation under the guise of taxation would come within the rule.

Conclusion.

I have endeavoured in the foregoing pages to meet the chief points raised against the view that international law can be invoked to protect the property of aliens from confiscation by general legislation. If in support of my thesis I rely mainly on judicial and other precedents of an international character it is because, as I have repeated more than once, the question at issue appears to me to be, first and foremost, a question of fact, and this is the best available evidence. But it is not to be forgotten that the great weight of authoritative opinion in matters of international law, both in Europe and America, also supports my view.

In stating the rule I have no intention of being dogmatic. There is almost always room for doubt as to the precise content of any given rule of unwritten international law, and the absence of logical completeness does not justify either its rejection or the refusal to admit its existence. One must be satisfied with a working rule agreeable to general principles of justice so far as it goes, even if it does not meet every case to which such principles may be thought to apply.

On the whole, I submit in answer to the question in issue that

it is a general rule of international law that if a state expropriates the physical property of an alien without the payment of full¹ compensation it commits a wrong of which the state of the alien affected is entitled to complain, even if the measure of expropriation applies indiscriminately to nationals and aliens.

Further—although perhaps the position is not here equally clear—I think the precedents tend to establish that a measure such as a state monopoly, which appropriates for the benefit of the Government, and thereby destroys the business (as distinct from the physical assets) of foreigners, without compensation, is contrary to international law even if equally applicable to nationals. But in view of the difficulties created by the nature of the “property” in question I doubt whether any precise rule defining the redress due can, at the present time, be formulated.

¹ In using the term chosen by Sir John Fischer Williams I do not wish to imply that international law requires a mathematically rigid standard. In practice it is, of course, obvious that the Government of the alien would never take up a claim unless it was based upon a clear and substantial departure from the standard of full compensation.

EXTRATERRITORIALITY IN CHINA

By SIR SKINNER TURNER, late Judge of H.B.M. Supreme Court for China.

IN the following note I only propose to deal with that part of the theory of Extraterritoriality which concerns the exercise of jurisdiction by one Power in the territory of another Power: the exemption of the nationals of one state from the laws and the law courts of the state in which they may be. The outstanding example of this position to-day is in China: for in various ways a similar condition, formerly obtaining in Japan, Siam, and Turkey, has been abolished and foreigners in those countries are now subject to the jurisdiction of the territorial courts.

The recognition by Great Britain and other Powers of the Chinese Nationalist Government at Nanking, accompanying the conclusion of treaties conceding the principle of tariff autonomy, brings this question of Extraterritoriality into the foreground of Anglo-Chinese politics again. And it has become a matter of practical politics, for various Powers have explicitly agreed to the surrender of their jurisdictional rights in China, though such surrender is by agreement postponed for a time. Thus the recent Belgian treaty says: Article 2: "The nationals of each of the High Contracting Powers shall be subject, in the territory of the other Power, to the laws and the jurisdiction of the law courts of that Power." It is well known that the abolition of the treaties—the "unequal treaties", as they are called—looms very large in the policy of the Chinese Government of to-day.

It is therefore peculiarly opportune that Mr. Keeton has just published his two volumes on *The Development of Extraterritoriality in China* (Longmans, Green & Co., 1928), following closely on the Report of the International Commission on Extraterritoriality in China.¹ These volumes are not unnaturally mainly, though not entirely, concerned with the history of this question from the standpoint of Great Britain; and they contain a very complete and accurate account of the early struggles over it from the beginnings of English intercourse with China down to the regulation of the whole matter by the treaties of 1843 and 1858, and even to the present time. It is common parlance for China's politicians to describe these and similar treaties as "unequal treaties forced on an unwilling China", but there is much to be said for the view that

¹ China: No. 8 of 1926.

the China of those days was not averse to be quit of the always troublesome problems arising out of jurisdiction over foreigners; and it is not easy to know how such a description can apply to the most recent instances of such treaties; that with Mexico of 1899 and that with Switzerland of 1918; the last named concluded after Germany and Austria-Hungary had lost their rights as a result of the Great War.

It is not necessary to discuss here the ultimate basis of this exercise of jurisdiction known as Extraterritorial: whether it is to be traced to the essential right of every Power to protect its nationals when in a foreign country, or to be regarded as based on custom or agreement by treaty. The question is fully dealt with by Mr. Keeton, and the weight of English judicial opinion is in favour of the latter view, the Privy Council holding in *Charlesworth Pilling & Co. v. the Secretary of State*¹ that a British extraterritorial judge is, by virtue of a treaty, in effect a judge of the territorial Power and, therefore, has judicial knowledge of such of its law as he has to apply (in that case land law). I have myself followed that decision both in Siam and China, and have refused evidence of land law as it was not, in an extraterritorial court, "foreign law" to be so proved. The fact remains that Great Britain, in common with other Powers, some sixteen in number, does now exercise in China, by virtue of treaty, jurisdiction over her nationals in her own courts, which are not in any way connected with the Chinese Ministry of Justice, and in those courts applies her own laws and not the laws of China. (As Mr. Keeton points out, the fact that Chinese land law (the *lex loci rei sitae*) is applied is not really an exception to the general rule laid down.)

The machinery adopted for the exercise of this jurisdiction is now to be considered. I can only deal here with the British system: those who may wish to know how other extraterritorial Powers have dealt with it are referred to Mr. Keeton's book and to the Commission's Report. The Foreign Jurisdiction Acts, 1890, &c., regularized the whole position and laid down that the procedure was to be by means of Orders-in-Council passed under and in conformity with those Acts. Such Orders then establish the courts essential to the exercise of jurisdiction; they lay down the classes of persons and things over which jurisdiction is to be exercised, the varieties of matters in which it is to be exercised and the law to be applied; they further give certain powers of legislation by means of Rules of Court and King's Municipal and International Regulations.

¹ [1901] A.C. 373.

By a gradual process of evolution the British machinery for the exercise of jurisdiction has now become very complete. Under the Order-in-Council of 1925 (largely a consolidating one, for no fewer than fifteen earlier Orders are repealed by it) which applies to the whole of China, save the Province of Kashgar, which is the subject of separate treatment, there are now established a series of Provincial Courts, a Supreme Court, and a Full Court, all sitting in China; and provision is made for an ultimate appeal in certain cases to the Privy Council in London. Each Consular District has its Provincial Court, with both civil and criminal jurisdiction; in Shanghai is the Supreme Court with its ordinary original jurisdiction in the Consular District of Shanghai and with concurrent jurisdiction with the several Provincial Courts, but having exclusive jurisdiction in certain matters (e.g. matrimonial causes, murder, &c.). In Shanghai also sits the Full Court acting as a Court of Appeal in both civil and criminal matters from the Supreme Court and from the Provincial Courts. A final appeal to the Privy Council may be made in civil matters either as of right or by leave of the Full Court.

In the Provincial Courts the consul for the district sits as judge: he can sit alone or with assessors; he has unlimited jurisdiction in civil matters, subject only to the right of the Supreme Court to withdraw any case to itself and to the need to report to the Supreme Court any case which seems to be outside his jurisdiction or which for other reasons should be tried in the Supreme Court. In criminal matters he can give no heavier sentence than imprisonment for twelve months with a fine up to one hundred pounds.

In the Supreme Court there is a Judge and an Assistant Judge, each of whom must be a barrister of seven years' standing: there is also a Registrar (who sits as magistrate) and a Chief Clerk (each of them a barrister or solicitor) with other officers. There is also a Crown Advocate, corresponding to the Attorney-General of a Colony, who must be a barrister of five years' standing. The Court sits alone or with assessors or with a jury; it has complete jurisdiction in all matters, civil as well as criminal, including Admiralty, Probate, Bankruptcy, and Matrimonial matters (and this last now covers Divorce). It ordinarily sits at Shanghai, but it may sit at any other place in China. I have known sittings to be held in Tientsin, Hankow, Canton, Harbin, and Tsingtao.

In the Full Court there are as a rule three judges, though provision is made for certain matters to be dealt with by two judges

or even by one judge. The two Shanghai judges, together with a judge from the neighbouring colony of Hong Kong (usually the Chief Justice), form the Court, which has the powers of the Court of Appeal and the Court of Criminal Appeal in England.

To the Privy Council appeals in civil matters where the amount in dispute is over £500 lie as of right; in other matters involving great general or public importance leave has to be obtained, and this can be granted by the Full Court. There is no appeal in criminal matters save by leave of the Privy Council.

In all these courts the law to be applied is the law of England, and in addition certain matters are declared to be offences by the Order-in-Council (e.g. perjury in a Chinese or other foreign court) or under local Regulations (e.g. in sanitary or port matters, or dealing with things like narcotics or arms). It is to be noted again that in Kashgar the laws of India have been applied and the Provincial Court there is under the Court of Burmah.

Such then is the machinery adopted by Great Britain for the exercise of her jurisdiction in China; and she exercises it over British subjects, their property and their rights and over British ships. She also exercises it under certain circumstances over foreigners whose Government has agreed that she should do so and over foreigners who themselves and by their competent authority agree in a particular case that she should do so; and under this provision I have tried a collision case between a British ship and a Chinese ship in which I had full power to decide where the fault lay and to assess the damages to be paid by one side or the other.

The procedure of these courts is laid down in Rules of Court made by the judge of the court and approved by the Secretary of State. It is to-day based upon the English County Court practice, though reference can be made to the procedure of the High Court and the County Courts in England in matters not provided for. It is worth noting that ample provision is made for the taking of security for costs from a plaintiff who is not subject to the jurisdiction of the court; while in criminal matters formal indictments have long been abandoned in favour of more simple "charges", and an inquest is turned at once into a "preliminary examination" as soon as it appears that a British subject is charged with the death under investigation. Sentences are as a rule carried out in China, though prisoners may be sent elsewhere, and I have known of men being sent to England, Australia, and Hong Kong to serve their sentences. The power of deportation is also given to the courts, either as part of a sentence or for special reasons contained

in the Order-in-Council; the conditions under which this power is to be exercised are carefully detailed. A death sentence can only be carried out after confirmation by H.M. Minister who, as well as the Secretary of State, has a power of mitigating or remitting any punishment awarded by a court.

The above is a brief summary of the system adopted by Great Britain for the exercise of her treaty rights of jurisdiction in China: it is a complete system and it has worked satisfactorily, though there are inconveniences and difficulties arising from it. These are fully and fairly set out in the Report of the International Commission, which of course was dealing generally with the whole question and not merely with the position as regards any one Power. I may mention a few of these difficulties: the consular courts of some Powers have only a limited jurisdiction in civil and criminal matters; others, like the British, have complete jurisdiction; uncertainty arises from the application in each court of the law of the defendant under which a different result on the same facts may be reached in different courts. Difficulties are inherent in such matters as the law of set-off and counterclaim, while consular officers may lack legal training and judicial experience and there may even be a clash between their judicial and administrative functions. Even with the complete jurisdiction that the British system provides, great trouble and expense may be involved: thus I remember a sitting in Harbin in the depth of winter to try one murder case. This meant a journey of some 3,000 miles altogether by sea and land; in addition to the court staff I had to take with me the Crown Advocate to prosecute and a lawyer to defend; and as the prisoner was convicted he had to be brought back to Shanghai under escort. The case lasted one day only. Even the journey from Shanghai to Hankow to try any case outside the jurisdiction of the Provincial Court involved a week's travel, while to Canton it was even farther, as that meant a change at Hong Kong.

And peculiar and somewhat unsatisfactory positions may arise. I had a long case at Shanghai relating to trade marks. The plaintiff was a (naturalized) Belgian: the defendant on the record was a British company largely composed of Chinese. The marks involved were on cigars manufactured in the Philippine Islands and sold in China. The defendant company was the distributor of these cigars, but the real defendant was the manufacturer, an American company. And that case was taken to the Privy Council under the name of *Ingenohl* (plaintiff and appellant) v. *Wing On &*

Co. (Shanghai), Ltd. (defendant and respondent).¹ That decision could only be binding on British subjects in China. A somewhat similar case had been heard in the Supreme Court of the colony of Hong Kong, but its decision had only force in the colony and therefore not in China.

It may be that the uncertainty of affairs and the general unrest in China account for the fact that some problems have not assumed greater proportions of recent years. I only remember one case (that of the murder of two Chinese by a British subject in Shanghai) in which I was asked under the treaty to make provision for the attendance on the bench with me of a Chinese official, though I see from the papers that another case has arisen lately. And yet I had many cases, some even involving Chinese Government interests, in which Chinese were involved. Then the matter of nationality, which must arise from time to time, was never very serious in my time. In Siam this was a constant trouble, but there was a satisfactory working arrangement to deal with it. The great problem in China is the existence of a number of persons of the Chinese race who come from Hong Kong or the Straits Settlements and are fully recognized by Great Britain, under the *jus soli*, as British subjects, but are claimed by China, under the *jus sanguinis*, as her citizens. It is not easy to see the solution of this difficulty as long as Extraterritoriality exists; and it seems to me probable that with the growth of national feeling this may assume greater proportions.

And what of the future? China is calling aloud for the abolition of this system. Her claims in 1921 at the Washington Conference led to the appointment of the International Commission on Extraterritoriality which met in Peking in the early part of 1926 and reported in September of the same year; and since then various treaties have been made agreeing to abolition. But there is no doubt that there is considerable fear amongst many foreigners in China as to the results of any abolition of it. This is not due to any doubt as to the abilities of the Chinese lawyers; that has never been in question. But one has only to read Mr. Keeton's account of what has happened in the past and is even happening to-day to account in some measure for it. It is also due in part to the absence of written laws and to the different conception of jurisprudence between the Western World and the East (e.g. the doctrine of responsibility). But behind all this is the fear that independence of the judiciary, so marked in our English system, is not assured.

¹ Privy Council Appeal: No. 81 of 1925.

New codes may be made to supply deficiencies (and several are promised this year), but is the interpretation and application of them to be free from political and even military interference? Will China's modern courts administer justice "without fear or favour, affection or illwill"? For China has established a system of modern courts, which are intended in time to oust the older forms of courts. Even now these courts are described as "the most satisfactory courts in China",¹ and it is to them that China has assigned all cases in which Germans are involved.² To them, no doubt, in future will be assigned the cases in which other foreigners are involved. The Commission, struck by the small number of these courts in China, recommended an extension of the system.³ It is now known that much good work is being done in them; but their very existence is unknown to many foreigners resident in China, for cases brought by foreigners against Chinese citizens go, under the existing treaties (as a rule), to the old-fashioned "Magistrates courts" sitting with the plaintiff's consul on the bench. These courts are the oldest in China and are admittedly unsatisfactory.⁴ It has always seemed to be a pity, from China's own point of view, that it was not possible to arrange that the "Modern" courts sitting with assessors should be the tribunals to try (under the existing treaties) cases brought against Chinese citizens, but any such arrangement was found to be impossible.⁵ (It is known that nowadays some foreigners prefer to take their cases into these "Modern" courts (without the presence of their consul) rather than face the uncertainty and delay of the Magistrates courts).⁶

Some account of these "Modern" courts may well be given here. A very full account is given by the International Commission in its Report.⁶ The system adopted is based on those of Japan and of continental European countries; it was begun under legislation of 1907 and 1909, and in its conception was "quite satisfactory".⁷ Provision is made for a Supreme Court at Peking, a High Court in each Province, and a District Court in each District. Originally there were also Local Courts, but these have been abolished in favour of "summary" divisions of the District Courts. Cases begin in the District Court sitting (*a*) in its summary division with one judge, with an appeal to the District Court of three judges,

¹ *Report of the International Commission on Extraterritoriality in China*, para. 229.

² Keeton, Vol. I, p. 291.

³ *Report*, para. 127.

⁵ *Ibid.*, para. 18.

⁴ *Ibid.*, para. 180.

⁶ *Ibid.*, paras. 125-32.

⁷ *Ibid.*, para. 177.

and a final appeal to the High Court of three or five judges; (b) in its ordinary division with one judge or, on an order of the court, with three judges, with an appeal to the High Court of three or five judges and a final appeal to the Supreme Court of five judges. Provision is made for securing properly trained men for the judicial service and more than half the judges have been in the service for ten years or more. The Commission noted that in 1925 twenty-one out of the thirty-two judges of the Supreme Court had been educated abroad, mainly in Japan.¹ There are complete codes of Civil and Criminal Procedure; judgments have to be written, setting out not only the decision but also the facts and the reasons for the decision; the parties may be represented by legal advisers, and have ample opportunities for appeal in civil and criminal matters.

There is no doubt that the foreigner feels safe under the existing Extraterritorial system: he does not feel that he will be safe under a Chinese administration of justice, even in these "Modern" courts; and it is practically certain that, once Extraterritoriality is abolished, there will be no retracing the step. In view of the whole history of the matter, it is not to be wondered at that he looks for some safeguards in the future. China, unlike Japan and Siam, has steadily set her face against the employment of foreigners in her Ministry of Justice, though it is worth noting that she does employ them in her courts at Harbin.² And, in view of the past history of the administration of justice by the Chinese people, the foreigner, before he surrenders his present position, claims to be entitled to ask for reasonable certainty as to the laws under which he is to come; some harmony between those laws and those of the western world; an adequate supply of trained men to administer them and some assurance of their independence in the exercise of their judicial duties. And, above all these, what is really wanted by every well-wisher of China, a stable Government whose writ runs over the whole country with a regular legislative machine.

One of the recommendations of the International Commission was that consular courts should administer and apply certain of the laws and regulations of China.³ Mr. Keeton has criticized this recommendation as being likely to lead to difficulties when other than Chinese plaintiffs come into the court.⁴ It was never intended that this recommendation should mean more than the application of Chinese Statute Law when practicable. Just as British courts

¹ *Ibid.*, para. 231. ² *Ibid.*, para. 149. ³ *Ibid.*, para. 95. ⁴ Vol. II, pp. 96, 97.

now administer Chinese Land Law, so they might administer a Chinese Law of Contracts. At present, in Kashgar, the British court applies the Indian Penal Code: in the rest of China the English Criminal Law is enforced. Why not the Chinese Penal Code? This plan would not involve any knowledge by consular judges of the laws of other states when their nationals were plaintiffs; and it is known that consuls, who now sit on the Provisional Court in Shanghai, do administer the Chinese Penal Code. Such a policy, if carried out, would accustom the foreigner to the territorial laws of the country in which he is; and as China progresses in the codification of her laws, the increasing application of those laws could regularly follow until the time had come for the final abandonment of Extraterritorial Jurisdiction in China and the submission of all residents there to the laws and the law courts of the country.

DECISIONS OF MUNICIPAL COURTS AS A SOURCE OF INTERNATIONAL LAW

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I

THE function of decisions of municipal courts as a source of international law has hitherto been obscured by four factors: by the current preoccupation with decisions of prize courts and their identification with decisions of municipal courts in general; by the rigid predominance of the positivist doctrine; by the so-called dualistic conception of the relation between international law and municipal law; and by the confusion enveloping the conception of sources of international law on the one hand, and the nature of the function of municipal judges on the other.

The fact that prize courts dispense international law on behalf of the territorial sovereign and that the law which they administer is ultimately determined by their national legislature and the imperative national interests in time of stress has had the result of creating a sceptical consensus of opinion to the effect that decisions of prize courts must necessarily be tainted by national bias and as such be of doubtful value for the creation of general international law. In a time when the laws of war occupied the major part of treatises on international law, this view tended to affect adversely the estimation of the value of decisions of municipal courts in other fields. They were either ignored or made to share the charge of unavoidable partiality levied against prize courts. However, the proper approach to the question discussed here does not lie through a proof of the truly international character of the latter. Lord Stowell did much in this country to vindicate the independent position of British prize courts, and his judgments in *The Maria*, *The Recovery*, and *The Fox*¹ will certainly rank among the most eloquent efforts to impress their decisions with the character of pronouncements emanating from free judicial agencies impartially administering international law. But these pronouncements should be read both in the light of the accompanying historical events² and of the subsequent history of

¹ 1 Chr. Rob. 350; 6 Chr. Rob. 348; 1 Chr. Rob. 312, respectively.

² The judgment in *The Maria*, in which the universality and the impartiality of the law administered by British prize courts was proclaimed for the first time and in a most solemn manner, was given on June 11, 1799. It will be observed that between the years

maritime warfare, including the period of the World War.¹ The share of prize courts in the development of international law, great as it is, has inevitably become so controversial that it is convenient to exclude it altogether from the scope of the present article, which, accordingly, is concerned only with such decisions of municipal courts as bear upon the international law of peace.

The exaggerations of the prevalent positivist doctrine acted as another obstacle in the way of a proper appreciation of the importance of decisions of municipal courts. According to that doctrine, extensions of the field of implied consent of states must not be presumed, and consent must not be deduced from the mere fact of uniform observance of certain rules by states and their organs. Such concordance, says the doctrine, merely brings about what may be termed uniform external law, which, if it is to create a binding rule, must be deliberate and accompanied by the will to act in a manner which binds the state for the future. According to the dualistic view, closely allied to the positivist doctrine, municipal and international law are separated from each other by a formal gulf, which is the result of a fundamental difference in the ways in which the law is created, in its subjects, and its matter, so that municipal courts are formally incapable of applying and, in consequence, of developing or creating international law. This attitude of indifference towards decisions of municipal courts has been fostered by the separation of international customary law from its constitutive elements, which have been given the name of *evidence* of custom and subsequently separated from custom itself. The opinion has been largely accepted that, under a most favourable construction, municipal decisions are only evidence of custom, but not a factor creating customary international law. Viewed from a different angle, this attitude is the outcome of the rigid separation of the judicial from the legislative functions in the direction of totally divorcing the work of judges from law-making proper. As in any case, it is said, judges only apply existing law, their decisions are of little or no consequence for the creation of international law.

1796 and 1802 there sat in London, with considerable interruptions, the Mixed Commission under Article VII of the Jay Treaty, and that questions as to the finality and the character of the decisions of the British prize courts were among the main issues in the deliberations of the Commission. See Moore, *History and Digest of the International Arbitrations, &c.* (1898), Vol. I, pp. 324 *et seq.*; *ibid.*, Vol. III, pp. 3161 *et seq.* (Opinion of Commissioner Gore in the case of *The Betsey*); and Lapradelle et Politis, *Recueil des arbitrages internationaux*, Vol. I (1905), pp. 87 *et seq.*

¹ See Garner, *Prize Law during the World War* (1927), Sections 126-37.

It is believed that the effect of this attitude has been harmful inasmuch as it has tended to create the impression that the interest in internationally relevant municipal case law is a peculiarity of English and American international lawyers unduly generalizing their passion for case law. It has deprived international law of a fruitful source of development, and has diminished the opportunities for taking advantage of the lessons of judicial treatment of international law in a world in which these opportunities are not frequent. As an unavoidable consequence, it has tended to impair in municipal judges administering international law the consciousness of being—on a higher plane—the organs and trustees of the international legal community bound to apply international law with the utmost care and impartiality in the spirit of that unity of international and municipal law which is the goal of legal development.

It is proposed here to examine the reasons underlying this attitude of indifference. The main purpose, however, of the present article is an inquiry into the actual extent of the contribution of municipal courts to the development of international law.

II

The Scope of Decisions of Municipal Courts affecting International Law.

As stated, the discussion of decisions of prize courts lies outside the scope of this article. But there is, quite apart from judgments of prize courts, hardly a branch of international law which has not received judicial treatment at the hands of municipal tribunals.¹

¹ Reasons of space do not permit an exhaustive enumeration of the more important cases decided by municipal tribunals of different countries on the questions mentioned in the text. Apart from the decisions of British and American courts, there exist numerous valuable decisions of the highest courts of France, Germany, and Italy, and other countries. The references in the footnotes which follow relate mainly to works or monographs where groups of cases are discussed or enumerated.

Reports of the non-English municipal cases bearing upon international law will be found in the official or private law collections of decisions like *Giurisprudenza Italiana*, *Entscheidungen des Reichsgerichts in Zivilsachen und Strafsachen*, the *Recueils* of Dalloz and Sirey, the *Pasicrisie Belge*, &c. But apart from the English-American collections of cases, mainly for the use of students, like those compiled by Pitt Cobbett, Scott, Bentwich, and Evans, there are no systematic or periodical collections of national decisions of interest for the international lawyer, although some periodicals of international law, in particular Clunet's *Journal de droit international*, frequently report such decisions. It is hoped that the gap will be filled to a certain extent by the publication

Their judgments deal with the nature, the sources,¹ and the subjects² of international law, and with its relation to municipal law.³ They define the position and requirements of the state as an international person,⁴ including the problem of the beginning of its existence as such⁵ and of its continuity in face of territorial changes.⁶ They define the legal status of various types of compo-

of the *Annual Digest of Public International Law Cases*, edited by Dr. McNair and the writer, and frequently referred to in the course of this article.

On the other hand, copious references to case law will be found in some textbooks of international law, of which foremost in this respect is Oppenheim's *International Law* as recently edited by Dr. McNair (4th ed., 1928); also Pradier-Fodéré's treatise contains frequent references to decisions of municipal courts. Professor Anzilotti's *Il diritto internazionale nei giudizi interni* (1905) contains a useful enumeration of municipal decisions, especially on pp. 160-73. International case law in the United States has been reviewed by Wright, *The Enforcement of International Law through Municipal Law in the United States* (1916) and Pergler, *Judicial Interpretation of International Law in the United States* (1928). Many monographs and works on special subjects are repositories of municipal case law on questions of international law. Here belong, in particular, in addition to works on extradition and nationality, the treatises of Praag, *Jurisdiction et droit international public* (1915), and Travers, *Le droit pénal international*, 5 vols. (1920-2). Cf. here Dr. J. B. Scott's *Cases on International Law* (1922), Preface, p. xvi, on the necessity of collections of decisions of national courts of various states.

¹ See here the English and American cases—some of them decided by prize courts—reported in Scott's *Cases*, pp. 1-18. See also *Thirty Hogsheads of Sugar v. Boyle*, 9 Cranch, 191, on the authority of municipal decisions ("The decisions of the courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect. The decisions of the courts of every country show how the Law of Nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this").

² Here belong, *inter alia*, numerous extradition cases in which the courts have expressed opinions as to the right of individuals to invoke rules of international law. A large number of these cases are referred to in Anzilotti, *op. cit.*, pp. 223 *et seq.* See also the *Spanish-German Extradition Treaty Case* in *Annual Digest*, 1925-6, for a repeated affirmation by the German Federal Court of the orthodox doctrine that international law does not confer rights upon individuals.

³ This group comprises, *inter alia*, numerous cases connected with the enforcement of treaties and with their relation to statutory law. An account of them will be found in Picciotto, *The Relation of International Law to the Law of England and of the United States* (1915), pp. 315-26; Pergler, *op. cit.*, 8-18. But it also includes cases bearing upon the relation of customary international law to municipal law, such as the English cases *Triquet v. Bath, Reg. v. Keyn*, and *West Rand Central Gold Mining Co., Ltd. v. Rex*—each of them a landmark in the flow of what Judge Moore (as he then was) called "the majestic stream of common law, united with international law". (Permanent Court of International Justice, *The Lotus case*, Judgment No. 9, p. 75.)

⁴ See, for instance, *Cherokee Nation v. State of Georgia*, 5 Peters 1, and other cases on the status of Indian tribes referred to in the *Cayuga Indians Claim case* in 1926 before the British-American Claims Commission and reported in *Annual Digest*, 1925-6.

⁵ See, for instance, a number of decisions of the highest tribunals in Czecho-Slovakia on the establishment of the Czecho-Slovakian state, reported in *Annual Digest*, 1925-6, and strikingly reminiscent of an American decision *in pari materia*: *McIlwaine v. Coxe's Lessee*, 4 Cranch, at p. 212.

⁶ See the decision of the Austrian Supreme Court in Civil Administrative Matters on

site states and their state members,¹ of protectorates and other semi-sovereign states,² of mandates,³ of other territories or parts of territories under joint or international control or supervision,⁴ of the Holy See before 1929.⁵ They are the chief source of judicial authority on the nature, the conditions, and the effects of recognition of states, governments,⁶ and belligerency⁷ as well as on questions of state succession and succession of governments, not only in regard to private rights in their different aspects, but also on such matters as succession in obligations laid down in treaties.⁸ Matters of jurisdiction, or rather, of restrictions upon the jurisdiction of the state, are their own peculiar province, and through it they decide a large number of questions of international law.⁹ Under this heading is the wide field of diplomatic immunities with

the Austrian Republic as the continuation of the Austrian Empire in the *Austrian Pensions (State Succession) Case* and of the District Court of Amsterdam on the Turkish Republic as the continuation of the Ottoman Empire in *Roselius and Company v. Karsten*, both reported in *Annual Digest*, 1925-6.

¹ Anzilotti, *op. cit.*, enumerates on p. 161, n. 1, numerous decisions on the legal status of the Austro-Hungarian monarchy, as well as of Switzerland, Germany, the United States, and other federal states.

² See, for instance, *The Charkieh*, L.R. 4 Adm. and Eccl. 59 and other cases on the international position of Egypt, Tunis, Bulgaria, and Congo, quoted by Anzilotti, *op. cit.*, p. 160, n. 1 and 162, n. 2.

³ In addition to the much-discussed case of *R. v. Jacobus Christian*, B.Y.I.L., 1925, p. 211, see here such cases as *Cape Law Society v. Van Aardt* on the legal relations between the mandatory Power and the mandated territory with reference to the execution of judgments given in the latter; the *Lebanon Expropriation Case* and *District Governor, Jerusalem-Jaffa District and Another v. Suleiman Murra and Another* on the rights and duties of the mandatory in Lebanon and Palestine, respectively; and several cases on nationality in mandated territories—all reported in *Annual Digest*, 1925-6.

⁴ Here belong, for instance, the decisions on the status of Bosnia and Herzegovina before 1908, in 13 *Clunet* (1886), p. 461, or of the Moresnet territory, 16 *Clunet* (1889), p. 494; on international leases (*United States v. P. W. Smith*, a case on the jurisdictional rights of the United States in Liaotung); on the legal status of the Governing Commission in the Saar Territory (*Saar Territory (Prussian Officials) Case*); on the authority of the International Rhineland High Commission (*Marchand and Duchateau case*); on territories under the authority of a plebiscitary commission (*Czecho-slovakian Spirit Duty (Plebiscite) Case*)—the last four cases reported in the *Annual Digest*, 1925-6.

⁵ See numerous cases cited in Praag, *op. cit.*, pp. 547-50.

⁶ See here Henry, *Les gouvernements de fait devant le juge* (1927), throughout; Oppenheim (4th ed.), §§ 75 d, e, f; Anzilotti, *op. cit.*, pp. 162, 163; and numerous cases in the *Annual Digest*, 1925-6, Part II D.

⁷ See Pergler, *op. cit.*, pp. 48-57; *Annual Digest*, 1925-6 (*Cía Minera Ygnacio Rodriguez Ramos v. Bartlesville*).

⁸ See for earlier cases Anzilotti, *op. cit.*, pp. 164-7 and Keith, *The Theory of State Succession* (1907), throughout. See also Scott, *op. cit.*, pp. 74-115, and, for a large number of cases, *Annual Digest*, 1925-6, Part II, E and F.

⁹ The comprehensive treatise of Praag, referred to above, constitutes a classical example of a treatment based on a conscientious consideration of municipal precedents. From this point of view Praag's work is an indispensable source of reference.

its vast variety of detail, including the question of the diplomatic immunities enjoyed by persons other than diplomatic envoys proper—for instance, by state representatives permanently accredited to the League of Nations.¹ The extent of jurisdictional immunities of foreign states, their heads, and their property, including their public ships and armed forces, belongs to the same group.² In a variety of ways municipal courts illustrate both the working and the legal implications of the régime of capitulations.³ The *Lotus* case before the Permanent Court of International Justice showed how extensively the parties and the tribunal had to rely on municipal decisions in regard to the question of jurisdiction over foreigners for crimes committed abroad.⁴ Here also belong questions of jurisdiction over foreign ships in ports, in territorial waters, at the maritime frontier, and on the high seas.⁵ It is mainly, although by no means exclusively, through the medium of jurisdiction that questions as to the extent of state territory in respect of the breadth of the maritime belt and of bays are dealt with by municipal courts. They have been frequently called to decide upon problems of acquisition of territorial sovereignty through accretion, accession, discovery, prescription, and conquest,⁶ or of restrictions upon it through servitudes⁷ or occupation in time of peace. Of the positive aspects of jurisdiction the question of recognition of acts of recognized states and governments, including the question of the extraterritorial effect of such acts, has been responsible for a considerable wealth of judicial precedent.⁸ The various aspects of questions of nationality, like naturalization, double nationality, denationalization and statelessness, constitute

¹ See *Annual Digest*, 1925–6 (*V. v. D.*), for an instance of an action against the representative of Jugo-Slavia accredited to the League of Nations.

² See Praag, *op. cit.*, throughout; Oppenheim, § 115; Scott, *op. cit.*, pp. 265–85; Pergler, *op. cit.*, pp. 101 *et seq.*

³ See the cases enumerated by Anzilotti, *op. cit.*, p. 169, n. 2. The *Annual Digest*, 1925–6, reports, *inter alia*, numerous cases decided by the Italian Court of Cassation.

⁴ See Permanent Court of International Justice, Series A, No. 10, pp. 28–30, 73–83, and Series C, No. 13–II, throughout, and in particular pp. 256 *et seq.*, 381 *et seq.*

⁵ Jessup's treatise on *The Law of Territorial Waters and Maritime Jurisdiction* (1927) contains exhaustive references to municipal precedents in various countries.

⁶ Numerous cases decided by the Supreme Court of the United States between the States of the American Union constitute here the main source of judicial authority. See Pergler, *op. cit.*, pp. 80–100; Scott, *op. cit.*, pp. 173–200, and, the same, *Judicial Settlement of Controversies between States of the American Union* (1919), *Analysis*, pp. 390 *et seq.* And see below on the recent application of the doctrine of prescription in disputes between Michigan and Wisconsin, and Mecklenburg and Lübeck.

⁷ See a judgment of the Cologne Court of Appeal in 1914, printed in the *American Journal of International Law*, Vol. VIII (1914), pp. 907–13.

⁸ See Oppenheim, p. 156, n. 1 and *Annual Digest*, 1925–6, Parts II A and IV A.

another wide field of application of international law. So do questions of extradition. That aspect of state responsibility which is connected with the duty of the state to prevent within its jurisdiction certain acts injurious to foreign countries is well represented in decisions of municipal courts.¹ The recent enlargement of the sphere of international protection of the individual through the minorities treaties has already brought forth a number of decisions forming a distinct contribution to this part of the law.² In the domain of treaties, municipal courts are constantly called upon to pronounce not only in regard to the operation of treaties in the municipal sphere and to the necessity of internal legislation, but also on the nature of treaties, the treaty-making power, their effect upon third parties, their termination and interpretation. Questions of law connected with the judicial settlement of international disputes lie naturally outside their scope, but even here we shall find decisions on such matters as the effect of an arbitral award.³ There are decisions of municipal courts on certain effects of measures of redress short of war,⁴ and although prize law, as already stated, lies outside the scope of this article, in other fields of the law of war the contribution of municipal courts cannot be ignored. It is sufficient to mention such questions as those of the beginning⁵ and termination⁶ of war, of the effects of outbreak of war upon treaties, upon contracts with enemy persons, and upon the personal status and property of enemy persons. The numerous decisions of national courts on questions connected with the occupation of enemy territory afford another instructive example.⁷

The above enumeration of matters covered by municipal decisions is apt to leave the impression that there is hardly a branch of international law which they do not touch. Such an impression would not be entirely misleading. Undoubtedly, there are certain matters which for obvious reasons are removed from

¹ See the numerous cases discussed by the writer in the *American Journal of International Law*, Vol. XXII (1928), pp. 105-30; Curtis, *ibid.*, VIII (1914), pp. 1-37, 224-52. But see also on other aspects of state responsibility Pergler, *op. cit.*, pp. 77 *et seq.*

² See, for instance, the "Czechoslovakian Language of Minorities Case", *Annual Digest*, 1925-6.

³ See Anzilotti, *op. cit.*, p. 174, n. 2; Pergler, *op. cit.*, pp. 188, 189; Wright, *op. cit.*, p. 102.

⁴ See Wright, *op. cit.*, pp. 28-30; Pergler, *op. cit.*, p. 193.

⁵ See here the numerous cases reviewed by McNair in *Transactions of the Grotius Society*, Vol. XI (1926), pp. 46-9.

⁶ See cases cited by Hudson in 39 *Harvard Law Review* (1925-6), pp. 1039-44.

⁷ A large selection of decisions connected with the law of war will be found in the *Annual Digest*, 1925-6, Part XI (War and Neutrality).

the purview of municipal courts; for instance, questions of fact on which courts regard themselves as bound to accept as conclusive the statements of the executive department of their state. But this and similar exceptions merely confirm the general rule that there is scarcely a question or class of questions of international law of which it could be predicated in advance that it is incapable of treatment and decision by a municipal court. To say that municipal courts are restricted to questions of jurisdiction is on the face of it inaccurate. A limitation of a different nature has been suggested by Triepel¹ and developed in detail by Anzilotti. Their theory is that whereas international law can never, by reason of the fundamental fact that it applies only to relations between states, constitute the cause of action in so far as private persons are concerned, it may and ought to be applied to the determination of preliminary questions which are only incidental to the main issue. "It happens", says Anzilotti, "that in the course of a legal process governed by municipal law, and accordingly by municipal courts, it is necessary to take into account principles and rules of international law; such a necessity arises in the shape of questions preliminary (*pregiudiziali*) and incidental to the solution of questions not governed by international law."² This, he appears to say, is not a case of individuals being governed by or invoking the law of nations, but of states applying it through their judicial organs. An example will illustrate this distinction: according to Anzilotti, the principle of immunity of diplomatic envoys is a duty prescribed by municipal law, whereas such questions as whether a particular grade of the diplomatic staff enjoys jurisdictional immunity, the beginning and the termination of the diplomatic mission, the effects of war upon it, and so on, are preliminary questions, which ought to be decided by international law.

Both the reasons underlying this distinction and its legal merits will be examined later. For the purpose of the present discussion it is sufficient to point out that the limitation to questions of an incidental character is of a merely formal nature and does not in fact restrict the scope of the application of international law. Even if it could be admitted that the function of municipal courts is thus confined to "incidental" questions, it is clear that practically all matters of international law, as enumerated on the preceding pages, are capable of coming and do come before municipal courts. It is these "incidental" questions which constitute practically the whole body of international law, seeing that its

¹ *Völkerrecht und Landesrecht* (1899), pp. 438, 439.

² *Op. cit.*, p. 159.

rules are as yet to a large extent of a jurisdictional character. To mention one instance: what remains, except a bare idea, of the law concerning diplomatic immunities, after the details of its application have been eliminated? The fact that the suggested limitation is merely a matter of terminology, and that it does not actually restrict the scope of judicial application of international law would in itself be sufficient to render it somewhat theoretical. But it has deeply influenced the appreciation of the value of municipal decisions in the field of international law, and it is therefore impossible to ignore it in this discussion. Its roots lie to a large extent in the view that as international law regulates only the relations between states, it also regulates only interests of states to the exclusion of private rights and interests. This view is in turn connected with the opinion that the proper and normal occasion for the judicial application of rules of international law is the existence of disputes between states. As a matter of fact, it is only by way of exception that they are thus applied. Normally, they are administered by the administrative and judicial authorities of states, partly because a great many of these rules regulate private rights or duties either directly or as determining the jurisdictional competence of the state, and partly because private rights and duties are frequently in other ways dependent upon the answer to questions of international law. The law of nations certainly protects the rights of and imposes duties upon states as such, but it also shields private rights for the protection of which the state is responsible either to other members of the international community or—as for instance in certain cases of state succession, when the rights protected are those of its own subjects—to the impersonal authority of international law. Frequently private rights are protected in the interest of the foreign state, but that does not deprive them of their character as private rights. Neither is it true to maintain that international law regulates only the conduct of states. It is more accurate to say that it regulates such individual conduct of its subjects or its organs as is in international law attributable to the state and for which it is ultimately responsible. A broad rule can be laid down to the effect that wherever a right, private or public, is claimed, or a duty, private or public, is sought to be imposed by virtue of or by reference to a rule of international law, or whenever recognition of such rights and duties proves in the course of an action to be dependent upon questions of fact or law determined by international law, in all these cases there is room for judicial application of international

law. Experience shows that the scope of such application is practically unlimited.

Finally, there should be mentioned in this connexion a number of judicial decisions which lie on the borderline between municipal and international case law. These are decisions by municipal courts settling disputes of a quasi-international character between member-states of composite states. This type of judicial settlement constituted the bulk of international arbitration among the city states of the various Greek federations in ancient Greece. It was revived and practised with considerable success in the second half of the Middle Ages between the cities of the numerous federations in upper Italy¹ and among the Swiss cantons.² In the Supreme Court of the United States, in its capacity as the judge in disputes between the sovereign states of the Union, it found an authoritative tribunal before which came important questions of international law.³ Only three years ago, in a boundary dispute between Michigan and Wisconsin, the Supreme Court had occasion to apply the doctrine of prescription.⁴ In the Judicial Committee of the Privy Council the members of the British Commonwealth of nations have another high tribunal for settling disputes between them on the basis of international law when applicable.⁵ Thus, to mention a recent instance, in the *Labrador Boundary Case* in 1927, the Judicial Committee applied the doctrines of discovery and of the watershed.⁶ The Swiss Federal Court exercises the function of the supreme judge between the members of the Swiss Federal State, and it is from this court that emanates one of the very few judicial pronouncements on the application of the

¹ See Frey, *Das öffentlich-rechtliche Schiedsgericht in Ober-Italien im XII. und XIII. Jahrhundert* (1928).

² See Usteri, *Das öffentlich-rechtliche Schiedsgericht in der Schweizerischen Eidgenossenschaft des XII.-XV. Jahrhunderts* (1925).

³ See Scott, *op. cit.*, and the same, *Sovereign States and Suits* (1925); Smith, *The American Supreme Court as an International Tribunal* (1920); Warren, *The Supreme Court and the Sovereign States* (1924).

⁴ 270 United States, 295; see also *Annual Digest*, 1925-6.

⁵ There seems to be interesting evidence in support of the view which connects the origin of the Supreme Court of the United States with the familiarity of the authors of the Constitution with the work of the Judicial Committee which had in the past advised the King in regard to boundary disputes between American colonies; see Warren, *op. cit.*, pp. 32, 33. And see on this point, and on the settlement of inter-state disputes by the Judicial Committee in general, Snow in *Proceedings of the American Society for Judicial Settlement of International Disputes*, 1910, pp. 124 *et seq.*; Riddell, *ibid.*, 1916, pp. 104-23; and Caldwell in *American Journal of International Law*, XIV (1920), pp. 38-52.

⁶ 43 T.L.R. at p. 294.

clausula rebus sic stantibus to relations between states.¹ The work, in recent years, of the German *Staatsgerichtshof* has shown how wide is the scope of the judicial application of international law in this field. In 1925, in a dispute between Lübeck and Mecklenburg-Schwerin, that court issued a provisional injunction based on the fact of long undisturbed possession, and dealt in an affirmative way with the question whether one state may exercise sovereign rights over a part of the territorial waters of another.² In 1926 it dealt with a request of Bremen asking for the termination, by virtue of the *clausula rebus sic stantibus*, of certain treaties of exchange of territory concluded with Prussia before the World War.³ In the following year it applied what it regarded as a rule of customary international law to a dispute between Prussia, Baden, and Württemberg, concerning the rights and duties of riparian states in respect of navigable rivers flowing through their territory.⁴ In all these cases the court availed itself of the provision of the German constitution which declares international law to be an integral part of German federal law.

III

The Formal Nature of International Law administered by Municipal Tribunals.

Can rules of international law administered by municipal tribunals be regarded as international law proper, or are they in fact rules of municipal law? The question seems at first sight to be of a purely theoretical character, but it has frequently occupied international lawyers, and is of considerable importance for the appreciation of the value of municipal decisions as a source of international law. It can be dealt with briefly. It is settled law that English judges are bound to administer customary international law as part of the law of the land. The position is the same in the United States and, by virtue of the constitutional provision already quoted, in Germany, both in regard to customary and conventional international law. The laws of almost all countries incorporate by direct reference rules of international law on various kinds of topics. According to a widely held view, that reference to international law *eo nomine* is the result of a faulty terminology adopted by legislatures, judges, and writers, who

¹ See Vol. VIII, p. 57 of the decisions of the Federal Court.

² See *Annual Digest*, 1925-6.

³ *Ibid.*

⁴ *Entscheidungen des Reichsgerichts in Zivilsachen*, Vol. CXVI, Appendix.

ignore the fundamental difference between international and municipal law. This difference, it is said, consists: (a) in that international law emanates from the collective will of states, whereas rules of municipal law have their origin in the will of one state; and (b) in that rules of international law regulate the relations of co-ordinated and autonomous entities united in a community lacking a judicial and political organization, whereas in municipal law the opposite is the case. It results in the impossibility of a formal identity of rules of international law and municipal law. If one may be allowed to quote Anzilotti once more:

"A rule of international law is by its very nature absolutely unable to bind individuals, i.e. to confer upon them rights and duties. It is created by the collective will of states with the view of regulating their mutual relations; obviously it cannot therefore refer to an altogether different sphere of relations. If several states were to attempt the creation of rules directly regulating private relations, such an attempt, by the very nature of things, would not be a rule of international law, but a rule of uniform municipal law common to several states. It is only by such rules that the private duty, as willed by international law, can be given effect."¹

These objections, he says, do not apply to preliminary or incidental questions on the ground that they are decided by judges acting as organs of the state, which as such is bound to apply rules of international law. It has already been noted that incidental questions may cover practically the whole field of international law, and this fact tends to emphasize the doubtful value of the distinction. Apart from this, it is difficult to comprehend why judges should not be able to apply international law to principal questions while they are bound to do so in regard to incidental matters. Both types of question involve private interests. If in incidental questions judges may and must apply international law, that must necessarily mean that individuals have in regard to these questions the right to invoke the law of nations²—a factor which in itself would be sufficient to disprove the theory of the fundamental inapplicability of international law as such to the regulation of private rights and duties.

The theory here examined seems to be a good example of the consequences of extreme positivism which frequently amounts to ignoring the positive law which it professes to recognize as the only source of authority. The only effective argument in support of

¹ *Op. cit.*, p. 177.

² See on this point Diena in *Revue générale de droit international public*, vol. XVI (1909), pp. 57-70.

that theory would be the negative proof that municipal law expressly eschews any direct reference to international law. Such a proof, being obviously contrary to facts, is not practicable. The only alternative left to the doctrine is to explain away the existing law by maintaining that its terminology is unsuitable. It explains it away by asserting that by the very fact of adoption the rules of international law have lost their original character and become municipal law. But this reasoning is not accurate, or, at least, not wholly accurate. Reference, adoption, or delegation does not deprive the original source of its true character. The law merchant does not cease to be the law merchant because judicial precedent and custom have adopted it as a source of law. This negation of the international character of the rules of international law adopted by municipal courts is, particularly in Anglo-American literature, largely due to the aberrations of the discussion centring round the question of supremacy of international law over the law of the land.¹ The formal supremacy of the law of the state has been defended with the help of the argument that rules of international law are valid in the municipal sphere, not as rules of international law, but as rules of the law of the land. But it is submitted that recourse to this argument is unnecessary. The supremacy of municipal law, if there be such, is safeguarded by the fact that international law had to be adopted² before it acquired validity in the municipal sphere. The principle holds good that whenever by implied or express delegation or reference to international law as a whole or to some of its rules rights are conferred or duties are imposed, the rules thus adopted preserve their original character as precepts of international law notwithstanding their adoption as part of the law of the land.

IV

Review of Authorities.

The attitude of writers in regard to the question under discussion is largely determined by their attitude to the major issue outlined in the two preceding paragraphs. Positivist writers of

¹ See, for instance, the exchange of views in the articles of Scott, *American Journal of International Law*, Vol. I (1907), pp. 831-6, and Willoughby, *ibid.*, Vol. II (1908), pp. 357-65.

² The believer in the supremacy of international law will say, rightly it is submitted, that the adoption had taken place by virtue of a duty imposed by international law, and that the failure to adopt it would engage the international responsibility of the state which ultimately must yield to the higher authority of the law of nations.

the continental school deny to municipal decisions any direct law creating effect in the sphere of international law, and the only concession which the more moderate among them are prepared to make is that such decisions are either evidence of pre-existing customary law or may influence the creation of subsequent customary international law. On the other hand, there are publicists who have no hesitation in regarding them as a source of international law proper. Reasons of space allow only a reference to the more representative writers. The attitude of both Triepel and Anzilotti, who have been among the leaders of the positivist movement in the last thirty years, is a negative one, and is based on grounds already indicated. According to Triepel, only the common will of sovereign states, consciously intent upon creating law, is able to produce international law. The will of a single state evidenced by its statutory law or its internal custom, judicial and otherwise, is unable to produce that effect. Secondly, as international law regulates relations between states only and exclusively, municipal law is formally incapable of becoming a source of international law.¹ Anzilotti has developed this view in more detail.² In addition to reasons based on the orthodox dualistic view, he points out that it is not sufficient for the creation of a rule of international law that the manifestations of the will of states should be of an identical content. These manifestations must be reciprocal, i. e. deliberately made to correspond to each other with a view to creating an obligatory norm in respect of the conduct in question. The law of a single state creates only external public law. It does not produce international law, and there is nothing to prevent the state from altering or repealing a law thus enacted, even if identical with that adopted by other states, so long as it has not become an objective rule of international law grounded in deliberate reciprocity. Professor Cavaglieri's recent treatise shows with what persistence scholars of authority adhere to this view.³ Oppenheim's contribution to the controversy follows the same negative lines, although his estimate of the practical value of municipal case law is illuminating and helpful.⁴ He attaches decisive importance to the argument that judges are not law-makers in the technical sense. He stresses the rather obvious truth that isolated decisions of

¹ *Op. cit.*, pp. 127, 128. See also pp. 28-32 and 99-101.

² *Op. cit.*, pp. 197, 198, and 143-6. See also his *La teoria generale della responsabilità dello stato nel diritto internazionale* (1902), pp. 30 *et seq.*

³ *Lezioni di diritto internazionale (Parte generale)*, 1925, pp. 56, 57.

⁴ *American Journal of International Law*, Vol. II (1908), pp. 336-41 (Chapter entitled "Appreciation of Municipal Case-Law").

national courts cannot bind a foreign state or abrogate a rule of international law, and denies that they directly concern international law even to the extent of binding the government of their own country. Both the manner of treatment and the negative results arrived at by Heilborn,¹ De Louter,² Fauchille,³ and others show clear traces of Oppenheim's influence.

Praag accepts the negative view of these writers except in regard to such judicial decisions as influence the legal sphere of other states, that is, decisions on questions of jurisdiction—which, as it happens, constitute the subject-matter of Dr. Praag's work and probably cover the major portion of the international law of peace. In this respect, he says, they form "une source véritable pour la formation du droit international public".⁴

However, there is a considerable weight of authority in favour of a more affirmative view. Westlake regards decisions of municipal courts as direct evidence of the consent of states, like treaties and other manifestations of the practice of states "so far as in all these ways they have proceeded on general principles and not with a view to particular circumstances, and so far as their actions and the judgments of their courts have not been encountered by resistance or protest from other states".⁵ Rivier, who defines international custom as the manifestation of the juridical conscience of states operating through acts repeated *opiniōne necessitatis*, regards unilateral acts of the legislative and judicial authorities of the state as constituting international custom. He is clearly of the opinion⁶ that concordant decisions of national tribunals are true manifestations of "*la conscience juridique internationale*". Geffcken expresses a similar opinion in his note to Heffter, who regards national decisions as evidence of custom.⁷ Of more recent writers Liszt (edited by Fleischmann),⁸ Fenwick,⁹ Koster,¹⁰ and, in part, Brierly¹¹ tend to accept the same view. Frequently writers include decisions of municipal courts in their enumeration of

¹ *Grundbegriffe des Völkerrechts* (1912), pp. 70, 71, and in Hague *Recueil des Cours*, 1926 (I), pp. 51, 52. ² *Le droit international public positif* (1920), Vol. I, pp. 56, 57.

³ *Traité, &c.*, 8th ed., Vol. I (1922), Nos. 55–57.

⁴ *Op. cit.*, p. 24. See Nos. 7 and 9.

⁵ *Collected Papers*, p. 83.

⁶ *Principes du droit des gens* (1896), Vol. I, p. 35.

⁷ *Das europäische Völkerrecht der Gegenwart*, 8th ed. (1888), § 8. So does Nys, *Le droit international*, 2nd ed. (1912), Vol. I, p. 167, who, however, stresses the fact that they are only evidence of custom, not custom itself.

⁸ *Das Völkerrecht*, 12th ed. (1925), pp. 16, 17.

⁹ *International Law* (1924), pp. 69, 70.

¹⁰ *Les fondements du droit des gens* (1925), *Bibliotheca Visseriana*, Vol. IV, p. 241.

¹¹ *The Law of Nations* (1928), p. 41.

sources of international law, more often than not in the same breath with the decisions of prize courts—a circumstance which is responsible for the accompanying qualifications of the impartiality of municipal case law and its law-creating effect in regard to other states. Here belong, for instance, works of Calvo,¹ Pradier-Fodéré,² and the recent treatise of Hyde.³

On the whole it appears that the attitude towards municipal case law is one of caution both on account of its association with prize courts and owing to the prevalence of the dualistic conception of international law. “Without pausing to consider the value to be attributed to the judgment of municipal courts in connexion with the establishment of a rule of international law”,⁴ the Permanent Court of International Justice proceeded, in the *Lotus* case, to examine at great length the relevant judicial decisions in various countries. That cautious attitude found also expression in Article 38 (4) of the Statute of the Court which provides that, subject to the provisions of Article 59, the Court shall apply “judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law”. However, the contention will be put forward later that the real *sedes materiae* of municipal case law is to be found not in the passage just quoted, but in those parts of this Article which designate as direct sources of international law “international custom, as evidence of a general practice accepted as law”.

V

Decisions of Municipal Courts as a Source of Customary International Law.

The basis of international law is the consent of states. Its sources are the facts and events showing the express or implied consent of the members of the international community. The implied consent deduced from these facts and events is the basis of international custom which is the sum total of such acts of the organs of the state undertaken *opinione juris* as bear upon rights protected and duties imposed by international law. As courts are

¹ *Le droit international*, &c., 5th ed., Vol. I, § 34.

² *Traité de droit international public* (1885), Vol. I, No. 30.

³ *International Law*, &c. (1922), Vol. I, p. 6. There is no qualification of that kind in Phillimore, *Commentaries*, &c, Vol. I, p. 55, who, while stating that “the consent of nations is also evidenced by the decisions of Prize Courts, and of the tribunals of international law sitting in each country”, is full of praise for the impartiality of prize courts.

⁴ Judgment No. 9, p. 28.

organs of the state, the rule may be formulated that decisions of municipal courts on matters of international law are a source of customary international law in so far as they are uniform and in regard to states the courts of which have participated in the creation of such uniformity. This rule, however, is far from being generally adopted.

The first question which arises in this connexion is: Are these municipal decisions custom proper or are they merely evidence of custom? There has been a tendency to attach importance to that distinction in the sense of accepting the latter alternative and rejecting the former. There is little to be said in commendation of that attitude. One of the reasons which complicate the issue under discussion is just the rigid separation of international custom as a source of international law from its various manifestations, namely, from the evidence of customary international law. There is no such distinction. International custom is nothing else than the sum total of concordant acts of states—"states" meaning organs of states, executive, legislative, or judicial. These acts are the substance of the purely formal conception of international custom, which without them is a bare idea. It may be conceded that the same event may be regarded, according to circumstances, both as evidence of custom and as a constitutive element of custom. But custom, when permanently divorced from "evidence of custom", is a legal conception as formal as consent when divorced from custom and treaty. When, therefore, the terms "consent", "custom", "evidence", are being used, we must not think that we are dealing with altogether different matters. These terms are gradual materializations, in a descending order, of the same content. Consent is a formal source; it finds its partial materialization in custom and treaty which in relation to it are the material sources.¹ Custom, in turn, taken in itself is a purely formal source of law; it finds its materialization in the various manifestations of the practice of states which are called evidence of custom, and which in relation to custom are the material source. Very little useful purpose is served by hypostatizing these terms and setting them up into rigid categories.² Definitions, useful as they

¹ See here Professor Higgins's *Studies in International Law and Relations* (1928), p. 98.

² The student of international law will note the periodical attempts "to introduce clarity" into the use of the conception of sources. Both the urgency and the effectiveness of these well-meant efforts are perhaps open to question. See, for instance, the article of Professor Corbett in this *Year Book*, 1925, pp. 20-30. It will be noted that Article 38 (2) of the Statute of the Permanent Court speaks of *custom* as *evidence* of the *practice* of states.

may be, must not become an obstacle to the recognition of the substance of things. If we halt for a moment and analyse the statement that a series of acts or declarations can be only evidence of custom, but not custom proper, we must see that such a statement amounts to a negation of customary law. Undoubtedly, some acts may be only declarative of pre-existing custom, but it is clear that whenever there is an urgent necessity for referring to them for the purpose of evidence, the existence of custom as such is or has become doubtful, and the "evidence" becomes the constitutive element of custom.

The law-creating effect of municipal decisions could be effectively denied only if it were possible to show: (a) that the requirements of international custom are different from those which, according to general legal principles, prevail in other fields of law; (b) that municipal courts cannot be regarded as the organs of the state called upon to act in the international sphere by producing binding effects in the domain of the creation of international law; (c) that the function of courts being limited to applying existing law, it is impossible to ascribe to them the function of *creating* customary law. No one of these propositions can be accepted:

(a) The opinion that uniformity of attitude on the part of state organs is not decisive so long as there is no express evidence of the will to enter a mutually binding obligation, has become very popular. It is not sufficient, says Professor Cavaglieri in his recent treatise, that the practice should be identical; "It is necessary that the uniform acts should be reciprocal, that is, intended to meet and to merge into the correspondent acts of other states."¹ What is the meaning of this qualification when applied to uniform legislative acts or to decisions of municipal courts? It is submitted that it is only a matter of speech. Judicial decisions are not political acts intended to produce results extraneous to the case before the court; their object is to pronounce judgments *opinio juris*, that is, in accordance with existing law or, when the law is not settled, in accordance with justice and with the nature of international law and relations. *Opinio juris* is the central requirement of custom, and it is in judicial decisions that this condition can be fulfilled in the international sphere in a spirit of

¹ *Op. cit.*, p. 56, 57 ("occorre che gli atti uniformi siano *reciproci*, cioè diretti ad incontrarsi, a fondersi con quelli corrispondenti degli altri Stati"). See, to the same effect, Triepel, *op. cit.*, pp. 28-32, 99-101; Anzilotti, *op. cit.*, pp. 143-6, 197, 198 and in *Corso di diritto internazionale*, 2nd ed. (1923), Vol. I, p. 43; Diena, *Diritto internazionale*, 2nd ed. (1914), p. 18; Heilborn, *op. cit.*, pp. 70, 71; Praag, *op. cit.*, Nos. 7, 9.

detachment and impartiality free from considerations of immediate and important interests of states. Official expressions of views of governments on matters of international law addressed to other governments or made before international tribunals are frequently partisan assertions of claims. They come from parties directly interested and frequently change with circumstances. The arguments put forward by representatives of states before international tribunals illustrate this point very clearly. The attitude of this country and of the United States in the Behring Sea arbitration on the question of admissibility in international law of damages for loss of profits was diametrically opposed to that adopted by them in the Alabama arbitration. In the latter case the views of this country on the question of the duties of neutrals were different from those adopted by her in the proceedings before the Commission sitting in 1796 under Article VII of the Jay Treaty. The views of the United States and of Great Britain, in arbitrations with each other and with other countries, on the respective merits of occupation and discovery as a title of acquisition of territorial sovereignty show an unusual degree of inconsistency. The persistent defence, for obvious reasons, of the natural law foundation of international law by the American counsel in the Behring Sea arbitration would have proved a source of embarrassment for the American representative in many of the subsequent arbitrations. Although opposing counsel occasionally try to make capital of such radical changes of attitude, an international tribunal has never, so far as we know, adopted it as a ground of decision. But the decisions of municipal courts on questions of international law before them are not opinions of an interested party eager to drive home an argument or to cloak a political claim with the garb of a legal rule. From the point of view, therefore, of intrinsic and lasting value the pronouncements of courts are more important for the formation of international custom than those of other state organs.

It is only the apprehension, stimulated by an exaggerated regard for sovereignty, lest the state be bound by rules based on its implied, as distinguished from its express will, that makes writers pile up these unnecessary conditions.¹ It is of the essence of custom that the binding force of its rules is based on implied, not express, consent, and a limitation—whatever it may mean—

¹ It is to a large extent the theory, prevalent on the Continent, of international custom as based on contract or agreement (*Vereinbarung*) which is responsible for this tendency to limit the scope of implied consent as the basis of custom.

which requires an express intention that the rules announced should meet and merge into the corresponding rules laid down by the organs of other states, strikes at the very roots of customary law conceived as implied consent. For the essential conditions of international custom and municipal custom are the same. This applies also to the rule that custom need not bind all members of the community; it may be partial and local, as in fact is the bulk of municipal custom in developed society. On the other hand, it is clear that the requirements of immemorial antiquity and of long repeated usage must be adapted to the fact that international law itself is of recent growth, and that the opportunities for creating or acting upon a rule being comparatively rare, a usage will harden into custom after a comparatively short period of time and after comparatively few occasions have arisen for its application. The only essential condition is that there should be *opinio juris*.

(b) What has been said so far is, of course, subject to the acceptance of the view that the decisions of the courts of a state can properly be described as acts of the state itself. It is difficult not to accept this view. The state as such is an abstraction. As an acting entity it is cognizable only through the acts of its organs. Courts are organs of the state, and the state is responsible for such of their acts as fail to give effect to international law. "It is an axiom in international relations that a sovereign state cannot speak with two voices"¹—that of the executive and that of the courts. They are the same voice. The conclusiveness in relation to courts of statements by the Crown in certain matters bearing upon international law is in the majority of cases only the necessary corollary of this principle.

The question could be asked: Are *all* organs of the state in a position to participate on its behalf in the creation of rules of customary international law? Is it not, for instance, a well-established rule that in regard to the conclusion of treaties any obligation undertaken by an organ of the state not duly authorized by its constitution has no binding effect whatsoever? The answer is that courts pronouncing upon questions of international law *do* act within their competence. Their judgments do not produce an express and immediate obligation in the same manner as a treaty does. They are not meant to do that. But their cumulative and indirect effect is to give expression to the *opinio juris* of the highest judicial organs of the state. This they cannot help doing, and no

¹ McNair, "Judicial Recognition of States and Governments, and the Immunity of Public Ships," in this *Year Book*, 1921-2, p. 65.

one who searches for the evidence of the legal conviction of states is at liberty to disregard the pronouncements of their courts.

(c) The view which denies to municipal decisions any part in the formation of customary international law on the ground that courts in general do not make law but only declare it, does not require elaborate refutation. It is now generally accepted that every application of a legal rule constitutes to a smaller or larger degree the creation of a rule for the individual case. It is equally generally admitted that although the nature of the law-creating activity of courts is different from that of the legislature, it is nevertheless constantly in operation. In few matters has the departure from the tenets of the analytical school been so radical as in this respect—not only in England and America, where judicial custom has always enjoyed the authority of an independent source of law, but also on the continent of Europe.

It is perhaps necessary to refer in this connexion to the persistent attempt to reduce the question here discussed to a somewhat trifling issue. Writers, who otherwise do not show excessive solicitude for the supremacy of the law of nations, are in the habit of pointing out that it would mean the end of international law if the municipal courts of a single country could create international law.¹ The apprehension is groundless. No one suggests that an isolated municipal decision can *proprio vigore* create a rule of international law. The thesis here submitted is that such decisions, when forming a link in a chain of concordant decisions *in pari materia* on the part of courts of several states, participate in the creation of a customary rule of international law. It may be added that when the decisions in question originate from courts of a large number of states and relate to a matter which lies within the particular province of those states, they will create customary international law binding also upon such states as had no occasion to signify their adherence to this rule.²

It appears from the foregoing that uniform municipal case law on questions of international law may well be regarded as forming part of "international custom as evidence of a general practice

¹ See, for instance, Willoughby, *The Fundamental Concepts of Public Law* (1924), pp. 284, 285.

² See Oppenheim in *Zeitschrift für internationales Recht*, XXV (1915), p. 8. If an instance taken from conventional international law may properly be used as an example, it was held by the Mixed Court of Appeal in Egypt that an international convention to regulate the question of salvage on the high seas adopted by almost all maritime states was applicable to Egypt, although she had never adhered to it. (See *Annual Digest*, 1925-6: *Crichton v. Samos Navigation Company and Others*.)

accepted as law" referred to in the second paragraph of Article 38 of the Statute of the Permanent Court of International Justice. Such uniform municipal case law is not included—or, at least, not wholly included—in the fourth section of this article which, subject to the provisions of Article 59, refers, *inter alia*, to judicial decisions as a subsidiary means for the determination of rules of law. Article 59 provides that "the decision of the Court has no binding force except between the parties and in respect of that particular case". This provision, as well as the entire history of that part of the fourth paragraph of Article 38, shows that the judicial decisions here referred to are in the first instance individual decisions of the Permanent Court itself, for which it was intended to secure all the persuasive influence of judicial precedent without adhering to the doctrine *stare decisis*. Possibly it refers also to individual decisions of municipal courts. But it is submitted that the true *sedes materiae* of uniform decisions of municipal courts in their cumulative effect as international custom is in the second paragraph of Article 38.

VI

Decisions of National Courts as an Element of Development of International Law.

However strong may be the claim of municipal case law to rank as a source of customary international law, its function in that capacity is limited owing to the fact that in many fields there is neither a sufficient number of precedents nor such a degree of uniformity as to warrant an affirmative conclusion as to the existence of a customary rule. But this limitation emphasizes the not less important part of municipal courts in developing and preparing the ground for the formation of rules of international law.

In the first instance, they bring into relief divergencies in the application of international law in different countries, and thus pave the way for the removal or reconciliation of such discrepancies as are of a merely accidental or formal character. These discrepancies are numerous, but it is rarely realized that far from being rooted in any real conflict of interests, they are frequently grounded in the peculiar circumstances of place and time. It is only through a comparative study of these divergent decisions that the differences can be reduced to their proper proportions and ultimately eliminated for the sake of a uniform application of international law. Thus, for instance, it is clear that there are

hardly any reasons of substance, from the point of view of the national interests involved, for the separate English-American practice and the so-called French rule in regard to the jurisdiction for crimes and offences committed on foreign merchantmen passing through the maritime belt. Moreover, a study of municipal decisions in this branch of law shows that the difference is one of approach only, and that in practice the courts of those countries deal with this question in much the same way. A study of municipal decisions will reveal that the practice of courts differs in regard to the question how far diplomatic immunity extends to acts not included within the field of the diplomatic functions of the envoy, but it will show at the same time how alien to any consideration of national interests are the reasons, if any, underlying this difference in treatment. These examples can be multiplied at will. It is mostly only a misplaced respect for the sovereignty of states which elevates these variations of practice to deeply rooted differences in the various systems of jurisprudence. Those acquainted with the work of international committees and conferences engaged upon the work of codification of international law know with what unenlightened loyalty delegates advocate the particular rule adopted in their states and how frequently this insistence wrecks the work of codification.

The part played by municipal tribunals in the development of international law appears even more clearly when we consider how largely international law is composed of definitions and abstract rules and principles. So far as application to the different situations and circumstances is concerned there are in regard to many questions hardly any uniform customary rules in existence. There is either a divergence of views or a total lack of precedent. The law relating to the immunities of diplomatic envoys is a case in point. Who would be optimistic enough to maintain that there exist generally recognized customary rules in regard to such questions as the actual extent of immunities, the immunities of the subject of the receiving state, the immunities of persons combining diplomatic and consular functions, immunities in respect of immovable property and actions *in rem* in respect of movable property, immunities in action brought in connexion with the non-diplomatic activities, commercial and otherwise, of the envoy and of his retinue, the different aspects of express and implied renunciation of immunity, admissibility of execution, admissibility of counterclaim and set-off, immunity, subsequent to the conclusion of the mission, for acts committed prior to the termination of the

mission, and many other questions? So far as rules of international law exist on these and similar points of detail, they are largely the product of the work of municipal courts. So far as they show divergencies it is through the decisions of municipal courts that the divergencies are revealed. Their decisions are the substance which fills the frame of the general principles. And it is normally before municipal tribunals, not before international courts, that the judicial application, in all required detail, of these rules takes place.

While developing international law in its details, municipal case law fulfils yet another function. It illustrates the practical difficulties inherent in some tendencies for reform in international law by revealing not only the inadequacies of existing rules, but also the difficulties connected with their total abolition. The question, much discussed in recent years, of jurisdictional immunities of public ships of foreign states may be mentioned as an example. Not the popular tendency to attack the sovereignty of the state in its numerous ramifications has been responsible for creating a movement for a change in the law on this matter, but, on the one hand, the absurdities and inconveniences shown as the result of cases which came before municipal courts and, on the other hand, the fact that courts in different countries continued to maintain different attitudes on the question. But this variety of practice has at the same time had the effect of showing the difficulties of the problem and of reducing to proper proportions some well-meant criticism. The reformer is frequently apt to see only the absurdity of some aspects of jurisdictional immunities. Well-reasoned decisions of municipal courts reveal in them the element of permanent necessity undiminished by occasional abuses or inconveniences.

The predominant tendency has been to disregard not only the function of municipal tribunals as sources of customary international law, but also as an element of development of international law. An attempt has here been made to show that a persistence in this attitude must result in disregarding a large part of international law as actually practised. If one may paraphrase a saying of Mr. Justice Holmes, international law, when washed with positivist acid, survives only as a bare skeleton of general principles. It is their application by courts which makes them live and develop. And as the opportunity of recourse to international courts is limited, the major part of the task devolves upon municipal tribunals. It is difficult to see how international law is to

develop if, as the result of the insistence on the rule of unanimity. international legislation is as yet in a rudimentary stage, and if, at the same time, the barren union of sovereignty and of positivism frustrates any constructive use of customary international law, based on the practice of states and evidenced in the impartial work of their judicial organs.

VII

Municipal Decisions as a Source of Particular International Law.

We have been discussing so far the function of municipal tribunals in the creation and the development of universal or general customary international law. It is now proposed to consider how far their decisions are instrumental in bringing about binding rules of particular international law. This amounts largely to inquiring how far the fact that the courts of a state have adopted a definite attitude on a certain matter prevents that state from taking up a different position in the international sphere, for instance, before an international court. Writers seem to be disposed to agree that there is nothing to prevent a state from assuming an attitude opposed to that previously adopted by its legislative organs or its courts. In support of this view, it could be pointed out that whereas customary rules are not the result of a conscious and deliberate intention to enter a binding obligation, principle seems to demand that, apart from custom, an intention to incur an obligation should not be lightly presumed; that one must not forget that legislative acts frequently go beyond the minimum of duty imposed by international law; and that it would not be satisfactory to treat states as moving in a constant zone of danger in which they are continuously being presumed to create law against themselves. This view, although plausible, is not, on consideration, very convincing.

There is no escape from the fact that in a legal community where the opportunities for creating law are limited, the conduct of its members must to a certain extent occupy the place of a source of law. Acts of competent state organs must at least be treated as evidence of what the state from which they emanate acknowledges to be the rule of law. Phillimore says, in regard to formal declarations of governments on matters of international law: "These public documents furnish, at all events, decisive evidence against any state which afterwards departs from the

principles which it has thus deliberately and solemnly invoked.”¹ If there is doubt as to the existence of a rule, it is appropriate to point out, as a matter of evidence, that the state itself acknowledged it by having acted upon it. These considerations apply with special force to judicial decisions, which as a rule confine themselves in an impartial manner to the domain of law, except when they act at the instance of the executive or the legislature—in which case it is again the will of the state which is responsible for their decisions.

The opinion must, therefore, be rejected that a state is always at liberty to go back upon a rule sanctioned by its own judiciary. The position is different when such departure does not adversely affect the interests of foreign states. But when a state seeks to modify, to the detriment of other states, the law embodied in the pronouncements of its courts, it is not justified in pleading that it never entered into a binding obligation. This is not the issue. The point is what, in a detached manner and in the normal course of affairs, it regarded as the law. The question is not of unfairly burdening the state with risks, but of not allowing it to throw overboard a rule which it suffered its courts to pronounce and of which it implicitly approved by not resorting to legislative measures to have the judicial pronouncement set aside. It is in the long run impossible to maintain a position which attaches decisive importance to the will of the state as a source of international law, and at the same time reduces to a minimum the opportunities for giving expression to this will. The obligation in the case under discussion is not one of general customary international law, but of particular international law; it is not evidence of the existence of a general rule of international law (although it may be that at the same time), but of a rule of particular international law brought about by the implied consent of the state to adopt the law as laid down by its courts. The state may, of course, plead that the law thus laid down is bad law, but the presumption will be against it and the burden of rebuttal will rest upon it. And that negative proof will not be an easy one in view of the presumption that states and their organs act in accordance with a rule of international law. The following rule, for which there exists no judicial authority, may therefore be submitted. In case of a dispute as to the existence or otherwise of a rule of international law the fact that the rule in question has been recognized and acted upon by the courts of a state will be regarded as proving *prima facie* the existence of that rule so far as that state is concerned. In regard to that state the

¹ *Commentaries on International Law*, Vol. I, p. 54.

rule will be looked upon as having the effect of a customary rule of particular international law. And there is at least one case in which it is even doubtful whether a state would be free to prove the existence of a rule of customary international law opposed to that hitherto acted upon by its own courts. In all cases in which a foreign state has relied upon the existence of a legal rule adopted by the courts of its neighbour, and, in particular, if, as the result, it has altered its situation for the worse, justice requires that that foreign state should be prevented from advocating an entirely different rule. Thus, for instance, if a foreign state has been induced by the constant practice of the courts of another country to adopt a restrictive interpretation of its own rights or to accord a specially favourable treatment to the subjects of that country, the latter will be estopped from going back upon the rule thus adopted. Estoppel is not merely a procedural, but also an equitable, rule of evidence not foreign to international practice.¹

Lastly, decisions on matters of international law given by the courts of a country, are, in a very real sense, a source of particular international law for the courts, the practising lawyer and the student in states in which judicial precedent is a material source of law. If a question of international law is covered by judicial precedent the judge will rely on it, frequently to the extent of quoting the precedent, and not the relevant rule of international law. This does not mean that once called to life precedents become permanent and immutable, and as such block the path of development. They are followed like any other precedent, which means that if need be they are consciously adapted to new conditions and, when antiquated, "distinguished" out of existence. Accordingly, although the lawyer is on safe ground when he turns in the first instance to the judicial interpretations of international law by the courts of his country in order to know how these courts will act in the future in similar cases, he must not treat them as immutable and as an invariably accurate interpretation of international law. The science of international law and the decisions of foreign courts, which frequently supply a much-needed corrective of the purely national point of view, should be regarded as a subsidiary source, for they influence in the long run the development of judicial precedent on matters of international law. It should also be noted that the authority of municipal decisions is not altogether negligible in countries where the function of judicial

¹ See the writer's *Private Law Sources and Analogies of International Law* (1927), pp. 202-6; and McNair in this *Year Book*, 1924, p. 34.

precedent is limited. The decisions of the highest courts, if not binding, are certainly of a persuasive character in those countries. So are, to a smaller extent, the decisions of courts of other foreign countries. It is not only as between English and American courts, but also between those of other countries, that the decisions of foreign courts on matters of international law are frequently referred to—an important step in the process of “internationalizing” internationally relevant municipal case law.

VIII

The Task of Municipal Courts.

The wide scope of the function of municipal judges administering international law and its importance for the international lawyer appear clearly from what has been said in the last three sections in regard to their part in creating general rules of customary international law, in developing the substance of international law, and in formulating rules of particular international law binding upon their state and applicable in it as law endowed with formal validity. It is proposed to consider in this concluding section the obligations which the performance of this function imposes upon municipal courts.

For one who chooses to confine himself to the field of municipal law, judges administer in all these cases the law of their own country, and nothing else. But one who looks at the substance of things rather than at their form must realize that when acting in that capacity municipal judges are the organs of the international legal community. In their decisions, perhaps only in them, the unity of international and municipal law reveals itself. Although their judgments are given in the name of the territorial sovereign, when questions of international law are concerned they must be rendered in accordance with the international duties of their state as bound by the rules of a more comprehensive and legal community. It is true that they are bound even by such statutory law of their state as is contrary to international law, but they are under a duty to interpret it so as to reduce the possibilities of conflict. This may be impossible on occasions, and courts are then compelled to comply with the will of the state. But the effect of the judgments thus given is provisional and subject to such changes as may be dictated by the international duties of the state enforced before an international forum.¹

¹ See on this point, Hyde, *op. cit.*, Vol. I, p. 12.

However, if the hope of a learned writer, expressed thirty-six years ago, that in the future "municipal courts may become the trusted mouthpieces of international law as local divisions of the great High Court of Nations"¹ is to become a reality, then their decisions must be not only studied, compared, and criticized, but also the work of the judges must be scrupulously impartial and thorough. It must be done with that special care and devotion which flows from the consciousness that states, on whose behalf they administer international law, are the guardians of the international legal order which is as yet in a stage of minority, as it were. This position of trust imposes upon them the duty of strict impartiality whenever the interests of their country are concerned. Lord Stowell's words about his court being a "Court of the Law of Nations, though sitting here under the authority of the King of Great Britain", of its belonging "to other nations as well as to our own", and of foreigners having "a right to demand from it . . . the administration of the *Law of Nations* simply, and exclusively of the introduction of principles borrowed from our municipal jurisprudence"² are applicable, with special force and with more real opportunity for strict observance, to decisions of municipal courts in time of peace. The treatment of foreign states and their subjects with the utmost courtesy and consideration of their legitimate interests should be a duty deliberately adhered to in times of crisis and national tension. There is a special occasion for this spirit of independence revealing itself in all cases affecting the national treasury. The record of municipal tribunals in this respect has not always been satisfactory, as is shown for instance by their practice in matters of state succession. Whereas they adhere to the doctrine that the state succeeds to the rights of its predecessor, they show at times a conspicuous reluctance to recognize the same rule in regard to the obligations contracted by the predecessor. The courts of the European succession states after the World War have pursued the same policy. The only instance in the post-war period of a court expressing itself in a pronounced way in favour of succession in obligation is the decision of the German Federal Court in 1926 in which it saddled the South African mandatory government with the responsibility for certain sums deposited with the former German administration.³ The manner in which certain courts have alternated in

¹ Walker, *The Science of International Law* (1893), p. 49.

² *The Recovery*, 6 C. Rob. 349.

³ *State Succession (Windhuk in South West Africa) Case*, *Annual Digest*, 1925-6.

accepting and rejecting the "Daimler" test¹ in respect of corporations and their shareholders is another illustration of this tendency. We find the French Court of Cassation applying the "Daimler" test in cases where the state seeks to seize the assets of former enemy subjects in their character as shareholders in a neutral corporation,² but the same court applied the orthodox doctrine of *siège social* when a subject of an associated Power asked for exemption from confiscation of his assets in a company registered in a former enemy country.³

Another duty flowing from the realization of the international task imposed upon municipal courts is that of thorough acquaintance with and equally thorough treatment of questions of international law underlying their judgments. Some of these decisions are monuments of patient investigation and learning. Judgments like those delivered by Mr. Justice Hill in *The Jupiter*⁴ cases on the limits of recognition of acts of recognized governments or of the German *Staatsgerichtshof* in 1927 in the dispute between Prussia, Baden, and Württemberg on the rights and duties of riparian states certainly rank with the best international arbitral awards.⁵ But this is not always so, and there are decisions of national courts in which the superficiality of treatment is only thinly veiled by references to authors of treatises on international law.

By not availing themselves to the full of the lessons of municipal decisions international lawyers have debarred themselves from access to a rich source of development of international law. In the long run such an attitude cannot fail to impair in those called upon to render these decisions the sense of responsibility for a comprehensive and scientific treatment of international law. It would be of advantage if judges could know that their decisions on matters of importance to international law are studied not only by the lawyers of their own country, but also, through a system of easily accessible reports, by scholars and students abroad, intent upon learning from judges conscious of the international character of their functions. From this point of view, one may consider the possibility of a development in which the highest national tribunals will prefer to ask competent international tribunals, preferably the

¹ *Daimler Co., Ltd. v. Continental Tyre & Rubber Co.* [1916] 2 A.C. 307.

² See *Liquidation de la Société des Transports Internationaux v. Séquestre de la Société des Transports Internationaux*, Recueil Sirey, 1925, Part I, p. 225.

³ See *Wilkens v. Lagarde et Procureur de la République près le Tribunal de Papeete*, *ibid.*, 1926, Part I, p. 268.

⁴ *The Jupiter*, No. 1 and No. 3 [1924] P. 236, and [1927] P. 122, 250.

⁵ *Entscheidungen des Reichsgerichts in Zivilsachen*, Vol. 116, Appendix.

Permanent Court of International Justice, sitting in its full strength, for an opinion on difficult or unsettled questions of international law which do not involve national interests. In a more integrated stage of international organization—which is still far off—this request for an opinion might assume the form of leave to appeal against the decision of the national court on a point of international law. It is not unusual for inferior municipal courts to invite an appeal from their own decision on questions of legal interest on which the opinion of the highest organs of the judiciary is felt to be desirable. However, a formal application, emanating from the highest judicial authorities of the country and addressed to the Permanent Court, for a ruling on any important question of international law pending before the municipal court would constitute a less radical step. Such a procedure, being a voluntary one in form and substance, would derogate neither from the sovereignty of states nor from the authority of their highest tribunals; it would testify that these tribunals regard themselves as the organs of the international community when administering international law, and it would give the Permanent Court, whose main work consists at present in interpreting treaty provisions, the opportunity of developing international law in much-needed directions. A suggestion of a procedure of this kind naturally raises a number of questions, such as the right of the Court to deal under its present constitution with matters referred to it in this way, and the necessity of appropriate changes in the Statute; the desirability of reserving to the Court the right to decide whether the matter raised in the application for an opinion is important enough to put into motion the machinery of the Court; the definite obligation, moral rather than legal, on the part of the municipal court in question to give effect to the ruling of the Permanent Court. These are questions of detail which need not be discussed here.¹ But it is believed that such an innovation would bring into relief the deep significance of the fact that international law is the only branch of law containing identical rules professedly administered as such by the courts of all nations.

¹ Professor Anzilotti discusses the possibility of municipal courts refraining in the future from dealing with questions involving matters of international law and referring them to specially instituted international tribunals. He dismisses this suggestion as a "*volo di fantasia*", but regards as more practicable the establishment, within the state, of special tribunals competent to adjudicate on questions of international law. *Op. cit.*, p. 193. See also, for a suggestion on lines similar to those in the text, Bisschop in this *Year Book*, 1923-4, pp. 131 *et seq.*

THE PLACE OF COMMISSIONS OF INQUIRY AND CONCILIATION TREATIES IN THE PEACEFUL SETTLEMENT OF INTERNATIONAL DISPUTES¹

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WHAT follows is a technical discussion of certain modes of adjusting international controversies.

The obvious function of a commission of inquiry is to investigate and report. Anything may be investigated; questions of fact over which controversy has arisen, or questions of law on which there is also disagreement.² As a fact-finding body, a commission of inquiry, a majority of its members being nationals of outside states, should be competent to ascertain the truth regardless of the gravity of the issue, and to make a report worthy of respect. Its conclusions on any of the factual aspects of a dispute touching, for example, the causes of events, or the authorship of acts, or the consequences of acts committed or contemplated, may be of first importance, as a means of enabling the states at variance to reach accord.³

If, however, the function of a commission of inquiry be to report findings on the law and thereby to fix responsibility, if any, for conduct the propriety of which is challenged, the value of the service must depend in part upon the competence in law and the judicial temperament of the persons comprising the commission.⁴

¹ An address delivered before the American Society of International Law, at Washington, April 26, 1929.

² While the elucidation of facts was the objective of the Commissions of Inquiry contemplated by the Hague Conventions of 1899, and 1907, the problem before the commission in the *Dogger Bank* case was to report on a matter of law, "particularly on the question as to where the responsibility lies and the degree of blame attaching to the subjects of the two High Contracting Parties or to the subjects of other countries in the event of their responsibility being established by the inquiry." (Protocol of July 29, 1899, *Am. J.* II, 929; also *Report of Commission*, id., 931.)

Compare matter for investigation in the *Tavignano*, *Camouna*, and *Gaulois* cases, under agreement between France and Italy, May 20, 1912, *J. B. Scott, Hague Court Reports*, 417, and *Report of Commission*, id., 413. See also *Report of the Commission of Inquiry in the Tubantia* case, under convention between Germany and the Netherlands, of March 30, 1921, *Am. J.* XVI, 485.

³ It is not believed that a commission of inquiry as a purely fact-finding body could do substantial injury to the states at variance through the exercise of its function.

⁴ It will be recalled that in the *Dogger Bank Case* the commission of inquiry was com-

That the report, whether on facts or law, does not embrace recommendations or give expression to an affirmative endeavour to effect accord between the states at variance is a distinctive feature of the service rendered.¹ From the report of the commission those states remain free to draw their own conclusions as to the course thereafter to be followed. To this circumstance may perhaps be attributed the readiness of numerous states to conclude with the United States bi-lateral conventions providing for the use of the plan of inquiry set forth in the treaties concluded by Secretary Bryan in 1913 and 1914, for the Advancement of Peace.² That plan is based on the principle that any phase of any controversy may reasonably be subjected to impartial investigation, during the course of which the states at variance may wisely pause and refrain from conflict, provided the report of the investigators be not the medium of a preachment or recommendation, and provided also that those states retain entire freedom to disregard it.³ The strength of the arrangement lies in the fact that it is designed to enable the states at variance, in consequence of the report of the commission, to work out themselves a solution of their controversy. It is seen also in the care taken not to jeopardize

posed of five naval officers of high rank, in pursuance of Article I of the agreement of July 29, 1899.

¹ In this respect the function of a commission of inquiry differs from that of a commission of conciliation. The distinction appears to be acknowledged in Article II of the General Convention of Inter-American Conciliation of January 5, 1929, which announces that: "The Commission of Inquiry to be established pursuant to the provisions of Article IV of the Treaty signed in Santiago de Chile on May 3, 1923, shall likewise have the character of Commission of Conciliation." See also McNair's 4th ed. of *Oppenheim*, II, § 11a.

² On March 29, 1929, the United States was a party to twenty-three treaties providing for commissions of inquiry, of which nineteen (those with Bolivia, Brazil, Chile, China, Denmark, Ecuador, France, Great Britain, Italy, The Netherlands, Norway, Paraguay, Peru, Portugal, Russia, Spain, Sweden, Uruguay, and Venezuela) were signed in 1913 and 1914, and of which four (those with Albania, Austria, Finland, and Germany) were signed in 1928. In addition thereto treaties had been signed in behalf of the United States, in 1928 and 1929 with nine other states (Belgium, Bulgaria, Czechoslovakia, Ethiopia, Hungary, Lithuania, Poland, Rumania, and the Serb-Croat-Slovene State). Negotiations for similar treaties were then in progress with ten other states. Three treaties, being those with Costa Rica (signed February 13, 1914), with Guatemala (signed September 20, 1913), and with Honduras (signed November 3, 1913), were superseded by the Convention for the establishment of International Commissions of Inquiry between the United States and the Central American Republics of February 7, 1923, *U.S. Treaty Series*, No. 717.

³ See in this connexion, *Treaties for the Advancement of Peace* (between the United States and other Powers negotiated by the Honourable William J. Bryan, Secretary of State of the United States), with introduction by J. B. Scott, and Comment by George A. Finch, New York, 1920. Also Philip Marshall Brown, *La Conciliation internationale*, Paris, 1925, 75-90.

the accomplishment of that task by recommendations which might weaken the influence of the commission's report. The Bryan plan is practical because it takes shrewd cognizance of the susceptibilities of opposing states in seasons of conflict, and opens a welcome door to direct negotiation under fresh conditions which may produce accord. Again, it minimizes and substantially eliminates dangers to either of the opposing states from a report adverse to its interests, not only because those states are not bound to accept the report, but also because neither of them finds itself opposed by an affirmative endeavour to effect accord which it might prove embarrassing to disregard. The Bryan plan is believed still to offer a sound means of facilitating the amicable adjustment of international differences.

In recent years it has been perceived that a commission authorized to make impartial investigation of the facts productive of controversy, may be competent also to exercise an additional function—namely, to endeavour by recommendation or other affirmative effort to effect agreement between the opposing states. It seems to be widely acknowledged that such an endeavour, if made under reasonable conditions by an appropriate body, may be highly desirable, provided the opposing states retain freedom to disregard the effort to bring about accord.¹ Arrangement for the exercise of such a function by a permanent body was effected by the treaty between the United States and Great Britain of January 11, 1909, concerning the boundary waters between the United States and Canada. By the terms of Article XI, provision was made for the International Joint Commission (established pursuant to the treaty) not only “to examine into and report upon the facts and circumstances of the particular questions and matters referred” to it, but also to accompany its report with “such conclusions and recommendations as may be appropriate.”² The reports were not to partake of the character of arbitral awards.³ The same idea

¹ Declared Dr. Van Hamel, Director of the Legal Section of the League of Nations, on February 1, 1926: “In principle, a treaty of conciliation establishes, as between the parties, an obligation to submit disputes which may arise between them to a Conciliation Commission or Commissioner. The essential difference between treaties of conciliation and arbitration treaties is that under the former the parties are obliged, in the first instance, to have recourse to the procedure for conciliation, but they are not necessarily obliged to abide by its result. The proposals of a conciliation commission must be, from their nature, optional; whereas the decisions of arbiters are binding.” (*Arbitration and Security, Publications of the League of Nations*, V. *Legal*. 1926, V. 14.)

² *U.S. Treaty*, Vol. III, 2607, 2612.

³ *Id.* See in this connexion “The International Joint Commission between the United States and Canada”, by R. A. MacKay, *Am. J.* XXII, 292, 308.

found expression in identical language in the proposed arbitration treaties between the United States and France, and the United States and Great Britain, signed during the Taft Administration, August 3, 1911, but which failed to be consummated.¹

Numerous bi-lateral and multi-lateral treaties have since manifested the readiness of states to confide such powers to international commissions. Those yielded to the Council and Assembly of the League of Nations under Article XV of the Covenant are well known and present a distinctive feature of the polity of that organization.² The efforts of Norway and of Sweden in 1920 to secure the annexation to the Covenant of a draft designed to establish commissions of conciliation and arbitration have been widely scrutinized;³ also the Resolution of the Third Assembly of the League, of September 22, 1922, encouraging the use of commissions of conciliation in harmony with the provisions of Articles XV and XVII of the Covenant.⁴

The several treaties have much in common. They confer upon commissions authority to do much more than to investigate and report, without, however, yielding the power to decide or adjudicate. They contemplate an affirmative effort on the part of commissioners to bring the opposing states together. Thus, for example, by the convention between the United States and the Central American Republics, for the "Establishment of International Commissions of Inquiry", concluded February 7, 1923,

¹ See Charles's Treaties (Senate Doc., 3d Sess.) 380 and 385, respectively.

² For the text of Article XV see *U.S. Treaty*, Vol. III, 3340.

³ See proposals of the Norwegian and Swedish Governments concerning commissions of arbitration and conciliation, *League of Nations, First Assembly, First Committee Minutes*, 75 and 83 respectively. See also Swedish explanatory statement, *id.*, 82.

⁴ *League of Nations, Records of the Third Assembly, Plenary Meetings*, 1922, 199-200. See also report of M. Adatei, *Rapporteur* of the First Committee, *id.*, 196.

See in this connexion McNair's 4th ed. of *Oppenheim*, II, § 11 d; also "*La Procédure de Conciliation devant la Société des Nations*", by Charles de Visser, *Rev. Droit Int.*, 3rd Series, IV, 21; A. J. Toynbee, *Survey of International Affairs*, 1924, London, 1926, 64-73.

See also historical statement by Dr. Arroyo Parejo, of Venezuela, on Dec. 17, 1928, before the Commission of Conciliation of the International Conference of American States on Conciliation and Arbitration. Dr. Parejo declares that "the original idea of the conciliatory method had its origin in America". He adverts to Article III of the treaty between Greater Colombia and Peru, of July 6, 1822 (William R. Manning, *Arbitration Treaties Among the American States*, 1924, 1), and also to Article XVI of the Treaty of Perpetual Union, Alliance and Confederation signed at the Panama Conference on July 15, 1926 (*International American Conference, Reports of Committees and Discussions thereon, Historical Appendix IV*, Washington, 1890, 187). It is believed, however, that the idea of conciliation found expression in the treaty of truce between Denmark and Sweden, of April 23, 1512 (Rydberg, *Sverges Traktater*, III, 570, referred to in C. E. Hill's *Danish Sound Dues*, 1926, p. 44.

the commission is given the "right to recommend any solutions or adjustments which in its opinion, may be pertinent, just, and advisable".¹ In the treaty of conciliation and judicial settlement between Italy and Switzerland of September 20, 1924, the task of the Permanent Conciliation Commission is "to further the settlement of disputes by an impartial and conscientious examination of the facts and by formulating proposals with a view to settling the case".²

By the terms of the Locarno Conventions of 1925,³ and also by those of the model bi-lateral conciliation conventions submitted by Mr. Politis to the Assembly of the League of Nations in September 1928,⁴ the task embraces the duty "to endeavour to bring the parties to an agreement". According to the General Convention of Inter-American Conciliation of January 5, 1929, the function of the commission is "to procure the conciliation of the differences subject to its examination by endeavouring to effect a settlement between the parties".⁵

The commission is oftentimes allowed to offer its services spontaneously on its own initiative;⁶ and it may even be authorized to restrict the conduct of the states at variance during the period of reference, as by devising provisional measures applicable to them,⁷ or by fixing their status.⁸

¹ Article V, *U.S. Treaty Series*, No. 717.

² Article V, treaty of conciliation and judicial settlement between Italy and Switzerland, September 20, 1924, *League of Nations Treaty Series*, No. 834; Article XIV, conciliation convention between Norway and Sweden, June 27, 1924, *id.*, No. 717.

³ Article VIII, arbitration convention between Germany and Belgium, initialled October 16, 1925, being Annex B of Final Protocol of the Locarno Conference, 1925, *Am. J. XX*, official documents, 25, 27.

⁴ Article XVIII of Bi-lateral Conciliation Convention (Convention c), Annex 2, to Report of the Third Committee to the Assembly (*Rapporteur*: N. Politis), on Pacific Settlement of International Disputes, Non-aggression and Mutual Assistance, *Publications of League of Nations*, IX. *Disarmament*, 1928, IX. 12.

⁵ Article VI, General Convention of Inter-American Conciliation, The International Conference of American States on Conciliation and Arbitration, Washington, December 10, 1928-January 5, 1929, Government Printing Office, Washington, 1929, p. 12.

⁶ Article VI, conciliation convention between Chile and Sweden, March 26, 1920, *League of Nations Treaty Series*, No. 111; Article III, treaty for the establishment of a peace commission between Great Britain and Chile, March 28, 1919, *Brit. and For. St. Pap.*, CXII, 717, 718. See also Article III, General Convention of Inter-American Conciliation, January 5, 1929.

⁷ Article XVIII, treaty of arbitration and conciliation between the Swiss Confederation and the German Reich, December 3, 1921, *League of Nations Treaty Series*, No. 320; also Article XIX, arbitration convention between Germany and Belgium, initialled at Locarno, October 16, 1925, being Annex B, to Final Protocol of the Locarno Conference, 1925, *Am. J. XX*, official documents, 21, 30.

⁸ Article XIII, Convention between the United States and Central American Repub-

A commission of conciliation is ordinarily composed of an uneven number of persons, embracing not only nationals of the states at variance, but also nationals of third states, so that the control of recommendations or proposals is lodged in a person or persons neutral to the controversy.¹ A joint commission composed of an equal number of representatives or nationals of the opposing states may, however, be utilized for a like purpose. As has been noted, such was the case in the convention between the United States and Great Britain concerning the boundary waters between the United States and Canada, concluded January 11, 1909.² Again, the work of conciliation may be entrusted to a single commissioner possessed of a nationality other than that of either of the opposing states, as is the case in the treaty of conciliation and arbitration between Hungary and Switzerland, of June 18, 1924.³

The treaties prior to 1929 present one distinctive feature which is reflected in provisions varying in fullness of detail. All seemingly contemplate that the task of endeavouring to bring about accord, through appropriate recommendation or otherwise, shall be the consequence of investigation. In numerous conventions care is taken that the commissioners shall not lapse into the easy ways of mediators. According to some, provision is made for a procedure designed to give the opposing states the right to be heard, and to apprise the commission fully as to their respective pretensions before it shall essay to make recommendations. Thus, according to the language of the Locarno conventions of 1925,

lies for the Establishment of International Commissions of Inquiry, February 7, 1923, *Treaty Series*, No. 717.

¹ Thus, it is provided in Article III of the convention between Norway and Sweden concerning the establishment of a conciliation commission, June 27, 1924: "The Commission shall be composed of five members. Each Party shall appoint two members, one of which may be a national of the appointing state. The fifth member, who shall act as chairman of the Commission, shall be a national of a state not otherwise represented on the Commission. He shall be appointed jointly by the Parties. Should the Parties be unable to agree, the chairman shall, at the request of one of the Parties, be appointed by the President of the Permanent Court of International Justice, or, should the latter be a national of one of the Contracting States, by the Vice-President of the Court.

"The Commission shall be appointed within six months after the ratifications of the present Convention have been exchanged." *League of Nations Treaty Series*, No. 717.

See also Article IV, of Treaty to Avoid or Prevent Conflicts between the American States, of May 3, 1923, *Treaty Series*, No. 752; also Article VII of League of Nations Model Bi-lateral Conciliation Convention of 1928.

² Article IX, *U.S. Treaty*, Vol. III, 2612.

³ Article III, *League of Nations Treaty Series*, No. 887. It was also provided that the commissioner should not be domiciled within the territory, or employed in the service of either contracting party.

duplicated in the text of the model bi-lateral conventions submitted to the Assembly of the League in 1928:

"The task of the Permanent Conciliation Commission shall be to elucidate questions in dispute, to collect with that object all necessary information by means of enquiry or otherwise, and to endeavour to bring the Parties to an agreement. It may, after the case has been examined, inform the Parties of the terms of settlement which seem suitable to it, and lay down a period within which they are to make their decision."¹

It also provided that:

"The Parties shall be represented before the Permanent Conciliation Commission by agents, whose duty it shall be to act as intermediary between them and the Commission; they may, moreover, be assisted by counsel and experts appointed by them for that purpose, and request that all persons whose evidence appears to them useful should be heard.

"The Commission, on its side, shall be entitled to request oral explanations from the agents, counsel and experts of the two Parties, as well as from all persons it may think useful to summon with the consent of their Government."²

The foregoing provisions are self-explanatory. They reveal the fact that according to European opinion what renders the recommendations or other endeavours of conciliators worthy of respect is the circumstance that they are the result of impartial and full investigation of all the facts, developed in the light of all of the contentions of every kind advanced by the states at variance. European states have accordingly, thus far exhibited no inclination to agree to have recourse to permanent commissions of conciliation, composed chiefly of nationals of third states, free to press their recommendations before being apprised of all the relevant facts, or before being made fully aware of the precise theories and contentions of the opposing countries.

The Treaty to Avoid or Prevent Conflicts between the American States, signed at Santiago de Chile, May 3, 1923,³ together with the supplementary and amendatory provisions of the General Convention of Inter-American Conciliation signed at Washington,

¹ Article VIII of arbitration convention between Germany and Belgium, initialled October 16, 1925, *Am. J. XX*, documents, 27. See in this connexion, A. Pearce Higgins, *Studies in International Law and Relations*, Chap. VII, "The Locarno Treaties", Cambridge: 1928.

² Article XII, *Am. J. XX*, documents, 28. According to Article IX: "Failing any special provision to the contrary, the Permanent Conciliation Commission shall lay down its own procedure, which in any case must provide for both parties being heard. In regard to enquiries the commission, unless it decides unanimously to the contrary, shall act in accordance with the provisions of Chapter III (International Commissions of Enquiry) of the Hague Convention of the 18th October, 1907, for the Pacific Settlement of International Disputes."

³ *United States Treaty Series*, No. 752.

January 5, 1929, deserves attention. They reflect in part a different theory. The former of these conventions known as the Gondra Treaty, in honour of the memory of its author, the distinguished Paraguayan statesman, Dr. Manuel Gondra, was a multi-lateral arrangement for the use of commissions of inquiry. Moreover, there were reserved from its operation "questions affecting constitutional provisions". The Gondra Treaty, having rather slowly won the approval of a large number of American Republics was deemed to offer a solid foundation for the new and broader plan set forth in the Convention of 1929.

"To the procedure of conciliation" are to be submitted all controversies of any kind without reservation, which have arisen or may arise between the contracting parties and which it may not have been possible to settle through diplomatic channels.¹ This "procedure" once under way may be interrupted—and "interrupted only" by a direct settlement between the parties or by their agreement to accept absolutely the decision *ex aequo et bono* of an American Chief of State or to submit the controversy to arbitration or to an international court.² The commission of inquiry provided for by the Gondra Treaty is transformed into one of conciliation.³ It is to be composed of five members, all nationals of American states. Each Government appoints two members at the time of convocation "only one of whom may be a national of its country". The fifth is to be chosen by common accord by those already appointed and performs the duties of President.⁴

¹ Article I. See also Article XV.

² Article XIII.

³ Article II. Declared Dr. Arroyo Parejo, of Venezuela, on December 17, 1928, before the Commission on Conciliation of the International Conference of American States on Conciliation and Arbitration: "The Gondra Treaty does not contain a real conciliatory method, since the commissions which it creates are not authorized to propose to the parties in discord the terms of a settlement."

⁴ Article IV of Convention of May 3, 1923. According to that Article: "The fifth shall be chosen by common accord by those already appointed and shall perform the duties of President. However, a citizen of a nation already represented on the Commission may not be elected. Any of the Governments may refuse to accept the elected member, for reasons which it may reserve to itself, and in such event a substitute shall be appointed, with the mutual consent of the Parties, within thirty days following the notification of this refusal. In the failure of such agreement, the designation shall be made by the President of an American Republic not interested in the dispute, who shall be selected by lot by the Commissioners already appointed, from a list of not more than six American Presidents to be formed as follows: each Government party to the controversy, or if there are more than two Governments directly interested in the dispute, the Government or Governments on each side of the controversy, shall designate three Presidents of American States which maintain the same friendly relations with all the Parties to the dispute."

The function of the commission is to examine, to report with recommendations, and to effect a settlement. At any stage of its labours the endeavour to bring the parties together is made appropriate. The commission may begin its work with an effort to conciliate¹ or it may do so at any time which it regards favourable therefor in the course of the investigation,² or within a specified period after it has made its report and recommendations to the states at variance.³ Thus throughout its life the commission is burdened with this special task. Unless its labours to effect accord have been successful, and under conditions that are specified, the commission is obliged to undertake a conscientious and impartial investigation of the questions which are the subject of the controversy, to set forth in a report the results of its proceedings, and to propose to the parties the bases of a settlement for the equitable solution of the controversy.⁴ "Once the period of time fixed by the commission for the parties to make their decisions has expired", that body is to set forth in a final act the decision of the parties, and, if conciliation has been effected, the terms of the settlement.⁵ The report and recommendations of the commission, in so far as it acts as an organ of conciliation, do not have the character of a decision or of an arbitral award, and are not binding on the parties "either as regards the exposition or interpretation of the facts or as regards questions of law".⁶

Declared Dr. Varela, the distinguished Uruguayan diplomat, as Reporting Delegate for the Committee responsible for the convention:

"As a general rule, and whenever this is proper, investigation precedes conciliation and the commissions organized in accord with Article 4 of the Gondra Treaty are first and foremost commissions of investigation. It is well understood that this does not preclude the commissions making use of the right to try conciliation which is authoritatively conferred upon them by paragraphs 1 and

¹ Article IV of General Convention of Inter-American Conciliation, January 5, 1929.

² *Id.*

³ *Id.*

⁴ Article VI.

⁵ Article XI.

⁶ Article IX. It is provided in Article VIII that the Commission of Conciliation shall "establish its rules of procedure", and that "in the absence of agreement to the contrary, the procedure indicated in Article IV of the Treaty of Santiago de Chile of May 3, 1923, shall be followed." That Article declares that the Commission "shall itself establish its rules of procedure". There is recommended for incorporation therein the provisions contained in Articles IX, X, XI, XII, and XIII of the convention between the United States and the Central American Republics of February 7, 1923 (*U.S. Treaty Series*, No. 717). Article X provides that "during the investigation the Parties shall be heard and may have the right to be represented by one or more agents and counsel". Article XII provides in part that "the Inquiry shall be conducted so that both Parties must be heard", and that "consequently, the Commission shall notify each Party of the statements of fact submitted by the other, and shall fix periods of time in which to receive evidence."

2 of Article 4 of the draft convention, but, we again repeat, the process of pacific settlement normally begins with investigation and is continued with conciliation."

He added:

"In regard to the commissions provided for in Articles 2 and 15, the draft endeavours to give to their conciliatory action the greatest amplitude and effectiveness possible by authorizing them to proceed, as organs of conciliation, at any moment after their organization, that is to say, before investigation, during it, or finally after the investigating procedure has been closed. In the first and second cases, the intervention of the commission will be purely optional and will depend on the opinion which is formed regarding the opportunity offered by a given moment for realizing the trial of conciliation.

"Neither does it fix rules of procedure for these cases."¹

Declared Mr. Hughes, the delegate of the United States on the same Committee:

"In Article 4 we said precisely that the commission which would be created under Article 2, to wit, the Gondra Treaty commission, should be at liberty to begin its work with conciliation without waiting for the inquiry. We also stated in the second paragraph of Article 4 that during its inquiry it could at any time endeavour to bring the parties into accord by conciliatory measures. And then we stated in the third paragraph of Article 4 that at a certain time, if the process contemplated by the Gondra Treaty had reached the end, they should be bound to see if they could not bring the parties into accord. All that is in the interest of peaceful settlement. In trying to create a friendly accord there are really no technicalities involved whatever. But if either party wished to have a full inquiry into the facts, that is the privilege of the party, and that inquiry will be had."²

Accordingly, either party, by rejecting the efforts of the commission to bring about accord prior to investigation, may decline to consider any conciliatory endeavours until they prove to be in fact the product of fullest investigation. Nevertheless, neither party can ward off, or prevent itself from being subjected to proposals for settlement recommended by the commission at any stage of its work.

Another feature of the convention deserves attention. Under the Gondra Treaty, two commissions, to be designated as permanent, were to be established at Washington and at Montevideo, and were to be composed of the three American diplomatic agents longest accredited in those Capitals.³ Their functions were to be "limited to receiving from the interested Parties the request for a convocation of the Commission of Inquiry" (for which provision

¹ Statement made on January 3, 1929, before the Commission on Conciliation, of the International Conference of American States on Conciliation and Arbitration.

² Statement made before the same Committee of the Conference on January 3, 1929.

³ *U.S. Treaty Series*, No. 752.

was made in an earlier article) and "to notifying the other Party thereof immediately". By the convention of January 5, 1929, these permanent commissions are clothed with new and important powers. By the terms of Article III, "they shall be bound to exercise conciliatory functions, either on their own motion when it appears that there is a prospect of disturbance of peaceful relations, or at the request of a party to the dispute, until the Commission referred to in the preceding article is organized."

In explanation of the plan Mr. Hughes declared:

"We desire to have some permanent organization that could do, perhaps, what this Conference has endeavoured to do in connexion with an existing incident, namely, to bring the parties into accord. In order to achieve that result and not to disturb the Gondra Treaty or to embarrass our relations by multiplying machinery without actually producing a helpful result, we thought we would give the permanent commissions conciliatory authority, pending the organization of the commission of inquiry.

"Then we thought that as neither party might ask under the Gondra Treaty for the creation of a commission of inquiry, we should at least have some conciliatory process available. Therefore we recommended that the permanent commissions established under the Gondra Treaty could of their own motion endeavour to effect conciliation. If that is followed by the institution of the proceedings suggested by the Gondra Treaty, well and good; then there will be machinery for investigation and conciliation. But in any event, if there is an exigent case, when there is a chance of a disturbance—a prospect of a disturbance of peaceful relations—there should be in existence some machinery of conciliation."¹

The American states, parties to the convention of January 5, 1929, thus appear to contemplate under the contingencies there specified, the exercise of good offices by a diplomatic body on which the states at variance are not necessarily represented as the normal preliminary to the use of a commission of conciliation. In fact it is only when one of the diplomatic commissions fails to bring about accord within the brief period before the commission of conciliation is organized, that the latter shall have an oppor-

¹ Statement made on January 3, 1929, before the Commission on Conciliation of the International Conference of American states on Conciliation and Arbitration. Mr. Hughes also said: "Must investigation always precede conciliation? In our sub-committee we thought not. Of course, very often, perhaps most of the time, investigation would precede conciliation, but it may happen that the parties could be brought to an accord without the long and expensive inquiry which would be necessary in following out to ultimate conclusion the procedure of the Gondra Treaty. There is no reason why, if the parties can be brought to a settlement, it should not be done. There is no reason why we should not have machinery for that purpose, in the interest of peace, or why we should have a long inquiry, perhaps into a very complicated problem, before conciliation can be begun."

See also statements before the same Committee of Dr. Varela of Uruguay, of Dr. Gutiérrez of Cuba, and of Dr. Alfaro of Panama.

tunity to function. The brevity of that period may, however, serve to give to the permanent diplomatic commissions small opportunity for service.

Two American states have recently agreed to have recourse to conciliation as one of the means of adjusting a grave conflict between them. By a protocol of January 3, 1929, Bolivia and Paraguay, accepting the good offices of the International Conference of American States on Conciliation and Arbitration, agreed that a commission of investigation and conciliation should "establish the facts" productive of the conflicts which have unfortunately occurred between them.¹ The function of the Commission is "to investigate, by hearing both sides, what has taken place, taking into consideration the allegations set forth by both parties, and determining in the end, which of the parties has brought about a change in the peaceful relations between the two countries".² Once the investigation has been "carried out", the commission is to submit proposals and endeavour to settle the incident amicably under conditions satisfactory to both parties.³ If this proves to be impossible, the commission is to render its report setting forth the result of its investigation and the efforts made to settle the incident.⁴ Moreover, the commission is empowered, in case it is unable to effect conciliation, to "establish both the truth of the matter investigated and the responsibilities which, in accordance with international law" may appear as a result of the investigation.⁵ The commission is further authorized, "to advise the parties concerning measures designed to prevent a recurrence of hostilities".⁶

A significant feature of the convention is the arrangement that the exercise of the conciliatory function in the submission of proposals for settlement shall follow, rather than precede, or be simultaneous with, the work of investigation. Again, as has been noted, the successful exercise of that function precludes the necessity of a report by the commission and the establishment by it of facts and conclusions of law which might prove embarrassing to one or both of the states concerned. In another respect the convention is of special interest. It marks the willingness of the

¹ The International Conference of American States on Conciliation and Arbitration (Washington, December 10, 1928-January 5, 1929), 90.

² Second stipulation.

³ Fifth stipulation.

⁴ *Id.*

⁵ Sixth stipulation.

⁶ Eighth stipulation. By this stipulation the parties "bind themselves to suspend all hostilities and to stop all concentration of troops at the points of contact of the military outposts of both countries, until the commission renders its findings".

contracting parties not only to have recourse to a commission of inquiry and conciliation, but also to permit that body, under a specified contingency, if its conciliatory endeavours shall have failed, to act in a quasi-judicial capacity. The convention thus registers agreement to submit to inquiry and conciliation, and if need be, to something akin to arbitration, all before a single body whose members are described as "delegates" of the states appointing them, and respecting whose competence in the law no requirement is laid down.

Treaties of conciliation are designed primarily for use in situations where statesmen are reluctant to have recourse to judicial tribunals of any kind. That reluctance may slowly sink into a much-desired desuetude. Before it does, however, foreign offices are burdened with the task of determining how the recommendations of conciliators may be most wisely utilized. Already, as has been noted, there appears to be a cleavage of opinion.

According to that which prevails in Europe, the recommendations of a commission of conciliation should be the product of an investigation elucidating questions at issue, and observing a procedure calculated to develop and disclose the contentions of the opposing states. Conversely, a state should not be exposed or subjected to the recommendations of such a body until such an investigation under such conditions has been completed. In point of procedure, conciliation should follow close in the wake of arbitration. According to opinion in America, as reflected by the General Convention of Inter-American Conciliation, a commission of conciliation should be encouraged to investigate everything; but it should not be obliged to do so before pressing its recommendations. Moreover, its labours for accord may, under certain conditions, well be supplemented or rather preceded by the unfettered endeavours of a body of diplomats. In a word, conciliation should be permitted oftentimes to follow in the wake of mediation. Europe would safeguard a state against a mere weight of conciliatory opinion dealing harshly with its pretensions by minimizing the danger of recommendations having a political rather than a factual or legal basis. America, on the other hand, would seemingly welcome any recommendations serving in fact to produce accord. It would minimize the likelihood of unfair or unreasonable proposals, as well as the actual dangers derivable from those of such a character, relying upon the freedom of the aggrieved state to disregard or ward off recommendations contemptuous of its equities as a sufficient safeguard therefor. It

remains to be seen which of the two theories is to make the stronger appeal to the nations of the world.

In another respect, conciliation deserves attention. The readiness of particular states to agree through bi-lateral treaties to have recourse to this procedure for the solution of grave differences which, howsoever described, they are reluctant to submit to arbitration, may depend in part upon the nature (in point of nationality) of the individuals in whom is lodged the conciliatory function. When a commission of conciliation takes the form of a joint commission comprised exclusively of nationals of two opposing states, confidence in its recommendations may be greatly enhanced. Moreover, if such a body be a permanent one, those states may become disposed and even alert to utilize it as a consultative agency to pass upon the probable effect of prospective conduct of the one party upon the interests as well as rights of the other. They may, in a word, willingly invoke its aid to safeguard themselves against actual harm to be anticipated from conduct not forbidden by international law, yet none the less provocative of conflict. If there be, for example, a Mexican-American interest, or a Canadian-American interest deemed worthy of conservation and development, permanent joint commissions of conciliation may offer a practical means of checking acts which, however lawful, are none the less contemptuous of such interest, and may do it grievous harm. Both at Montreal in September, 1923, and at Havana in February, 1928, the distinguished President of the American Society of International Law called attention to this unique service which it lies within the power of essentially joint commissions of conciliation to render in behalf of particular states.¹ The potentialities of conciliation are not exhausted until statesmen become reluctant to entrust the pretensions of their own countries to their own countrymen.

By way of summary it may be said:

First. In cases where a trustworthy investigation and report are calculated to suffice to enable opposing states to work out themselves a solution of their differences, commissions of inquiry as contemplated by the Bryan treaties for the Advancement of Peace

¹ See "The Pathway of Peace", an address delivered by Charles E. Hughes before the Canadian Bar Association, at Montreal, September 4, 1923, published in volume of addresses by that author entitled *The Pathway of Peace*, New York, 1925, 3, 16-17; also observations of Mr. Hughes on arbitration and conciliation at the Sixth International Conference of American States, *Report of the Delegates of the United States of America to the Sixth International Conference of American States* (held at Havana, Cuba, January 16 to February 20, 1928), Washington, 1928, 22-5.

offer a practical instrumentality for amicable adjustment. The absence of recommendations as well as the freedom of the parties to disregard the reports of commissioners may be expected to strengthen the appeal of such bodies.

Secondly. If amicable adjustments be sought through conciliation rather than through a commission of inquiry on the one hand, or a judicial tribunal on the other, every reason demands that the recommendations of conciliators embody the most equitable and enlightened proposal for a final settlement of the controversy, and hence one not lightly to be rejected by either party thereto. The probability that a proposal will attain such a character must depend in large degree upon the terms of the treaty confiding authority to the conciliators. Are they to exercise their good offices with the freedom and in the spirit of mediators, or are their endeavours to be the fruit of prescribed investigations? The question calls for the impartial conclusions of those responsible for the treaty policies of interested states.

Thirdly. As between two states having a special community of interest which may be seriously impaired by the unrestricted yet not unlawful action of either, conciliation exercised through the agency of an essentially joint commission representative of both states may prove to be a useful means of safeguarding that interest and of averting conflict.

THE REVISION CLAUSE IN CERTAIN CHINESE TREATIES

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I

The Doctrine of "Rebus Sic Stantibus".

It is no part of the present contribution to attempt to restate the doctrine of *rebus sic stantibus* in general terms.¹ Its primary purpose is to show how the doctrine has been recently invoked in practice with regard to an important group of treaties concluded between China and foreign Powers, and to explain how the invocation of the doctrine was treated, with the object of throwing some additional light upon the problem how far it may properly be termed a rule of international law at all.

Recent text-books pay a good deal more attention to the doctrine than was formerly the case. Underlying the whole law relating to treaties is the rule *pacta sunt servanda*. That one civilized state should be able to rely upon the pledged word of another civilized state, embodied in a formal document, seems to be a corner-stone of international relations, without which international security is largely illusory. At the same time it is clear that treaties sometimes outlive their utility, or impose burdens upon one party which are no longer essential for the security of the other, and the question then arises, ought such treaties to continue to be regarded by civilized states as a whole, as binding upon the parties? In other words, does International Law recognize the principle that a treaty may cease to be binding through lapse of time or changed conditions, altogether apart from any question of abrogation by mutual consent or in consequence of any stipulations included within the treaty itself?

The most varied answers have been offered in reply to this question. Spinoza held that an obligation need only be observed so long as it was profitable or expedient for the party bound to do

¹ For such a general restatement see Sir J. F. Williams: "The Permanence of Treaties", *A.J.I.L.*, January, 1928, p. 89, and Professor J. L. Brierly, "Some Considerations on the Obsolescence of Treaties", *Transactions of the Grotius Society*, Vol. XI, p. 11; Oppenheim, *International Law*, Vol. I (fourth edition), pp. 746-53; Brierly, *The Law of Nations*, pp. 168-75; Hall, *International Law* (eighth edition), pp. 406-17; Westlake, *International Law*, I, pp. 284-6, 291.

so¹—but this has never been the accepted view of international law at any stage of its evolution. Nevertheless, the views of some continental writers of distinction would concede a good deal more liberty of action to the signatories of treaties than is compatible with the continued security of international society, in so far as it is derived from the certainty that what a state has solemnly undertaken to do, it will perform. Thus, Heffter says that a treaty conflicting with the rights and welfare of the people of one of the signatory states is not binding, and Fiore goes still farther and holds null (not merely voidable) all treaties which are in any way opposed to the development of the free activity of a nation, or which hinder the exercise of the nation's natural rights.² Both these are little more than circuitous ways of saying that a state may repudiate a treaty when it is no longer convenient to observe it. This reduces the treaty itself to a "scrap of paper", and the obligation resulting from it to a rope of sand.

Anglo-American writers are practically at one in reducing within narrow compass the grounds on which a treaty becomes voidable, and the examples given below will be sufficient to show that their views are more in consonance with international usage. Lawrence is disinclined to formulate in general terms the grounds on which a state may consider a treaty to be no longer binding, and observes suggestively: "In truth these questions transcend law. They are outside its sphere; and its rules do not apply to them".³ Hall's view is that "neither party to a contract can make its binding effect dependent at his will upon conditions other than those contemplated at the moment when the contract was entered into, and on the other hand a contract ceases to be binding as soon as anything which formed an implied condition of its obligatory force at the time of its conclusion is essentially altered".⁴ Under these circumstances, Hall regards the treaty as voidable, but Sir John Fischer Williams points out that what Hall actually means is that "if conditions arise other than those contemplated when the contract was signed, then, first, from the subjective point of view of the contractants, neither can hold the other to the old bargain; and second, objectively, the contract as a thing existing *in rerum natura* has disappeared".⁵ At the same time, any attempt to decide whether a particular condition is, or is not, essential for

¹ Lauterpacht, "Spinoza and International Law", *B.Y.I.L.*, 1927, p. 99.

² See further "Hall's *International Law*", pp. 416-17.

³ *International Law* (seventh edition), p. 304.

⁴ *International Law* (eighth edition), p. 407.

⁵ *A.J.I.L.*, January, 1928, p. 91.

the continuance of the obligation is beset with difficulties. Sir John Williams's own view is that the doctrine is properly included within the pale of international law, and that it implies that when the essential conditions governing a treaty have changed, the outstanding obligations derived from it are no longer enforceable. At the same time it does not permit one signatory state to erect any condition which may have changed into an essential one, and by unilateral declaration, to rescind or modify its obligations. Before the treaty may properly be considered as no longer in force, either the assent of all signatory parties to that conclusion, or the decision of an international tribunal is necessary.¹

Professor Brierly regards the matter from a somewhat different standpoint. He does not consider that the doctrine is an accepted principle of modern international law,² and points out that in no instance has it been accepted as an adequate excuse for unilateral renunciation of treaty obligations. The real problem, he considers, is to find a solution of the problem raised when a state demands release from a treaty which was known and intended to be oppressive when it was entered into. At present, the only way out of the difficulty is by a resort to amicable reconsideration of the treaty, on the suggestion of the Assembly of the League of Nations, under Article 19 of the Covenant; but for the future, Professor Brierly considers the true line of development is towards a recognition by international law that no treaty produced by state coercion is entitled to legal protection and that all treaties should be concluded for a limited period.³ The same view is again advanced in the same author's *The Law of Nations*.⁴

There can be no question that Professor Brierly has enunciated what many writers and some states regard as a desirable aspiration, but it is difficult to see that it will solve all problems. In the first place, there are two sides to oppression. Professor Brierly considers the Treaty of Paris of 1856, in its Black Sea stipulations, oppressive, i. e. to Russia,⁵ but Sir H. Elliot, the British Ambassador to Turkey, wrote in 1870:

"The neutralization of the Black Sea is a bulwark as strong and more reliable than the signed guarantees of all the Great Powers of Europe. If it were not for it, Turkey would be almost helpless at the mercy of Russia. . . . The Turkish statesmen are so fully convinced of this and feel so keenly that if there should once be a powerful Russian fleet on that sea, after the completion of the railway system has rendered easy the rapid concentration of the enormous military

¹ *A.J.I.L.*, January, 1928, p. 102.

² *Transactions of the Grotius Society*, Vol. XI, p. 13.

³ *Ibid.*, pp. 18-19.

⁴ Pp. 168-75.

⁵ *Ibid.*, p. 18.

forces of the Empire, it will be in the power of the Russian Government to strike a fatal blow at the independence of the Sultan, at any moment when the Allies of the latter are unable to come forward to his assistance. They would rather fight now for that neutralization, which they regard as their best ally, than passively await the greater danger which will threaten them when they have it no longer to trust to."¹

England was equally convinced that Russian naval preponderance in the Black Sea was aimed ultimately at the acquisition of Constantinople, which, if effected, would be a direct threat to the security of British power in the East. The only question was how long Russia would consent to this limitation of her aspirations.

It can easily be seen, therefore, that a strong case may be made in defence of many so-called "oppressive" treaty stipulations. This is even truer with regard to treaties conferring extraterritorial rights, which are entered into, not because any state enjoys administering law within the territory of another, but because there would be no legal security for the nationals of the "dominant" state in default of such arrangements.

Again, even if international law only recognizes treaties freely entered into, this would include most of the treaties concluded by Foreign Powers with China last century (except those of Great Britain, France, and Japan), and in many of these there is no provision whatever (as will be apparent later) for the termination of some of the privileges conceded. In fact:

(1) All treaties concluded by force are not necessarily oppressive in incidence, and

(2) "Oppressive" treaties, in the sense of treaties imposing unequal obligations, are not necessarily concluded as a result of the application of force.

Oppenheim's view of the doctrine is as follows:

"When the existence or the vital development of a state stands in unavoidable conflict with its treaty obligations, the latter must give way, for self-preservation and development, in accordance with the growth and the vital requirements of the nation, are the primary duties of every state. No state would consent to any such treaty as would hinder it in the fulfilment of these primary duties. The consent of a state to a treaty presupposes a conviction that it is not fraught with danger to its existence and vital development. For this reason every treaty implies a condition that if by an unforeseen change of circumstances an obligation stipulated in the treaty should imperil the existence or vital development of one of the parties, it should have a right to demand to be released from the obligation concerned."²

¹ *Cambridge History of Foreign Policy*, III, p. 48.

² *International Law*, 4th ed., Vol. I, p. 748. Sir J. Fischer Williams believes that a vital change of circumstances automatically terminates the treaty from that moment. *A.J.I.L.*, January, 1928, p. 93.

Oppenheim's caution, however, that the doctrine *rebus sic stantibus* may only be resorted to in very exceptional circumstances¹ should not be overlooked, and his view of the correct procedure for a state to adopt is that when a vital change of circumstances causes treaty obligations to become unbearable, the state subject to them should approach the other parties with a request for revision or abrogation. If this is refused then a conflict between treaty obligations and the right to be released from them arises, which, in the absence of an international court, cannot be settled juridically.² This is scarcely a satisfactory conclusion, and the existence of Article 19 of the Covenant, which provides that the Assembly of the League may from time to time advise Members to reconsider treaties which have become inapplicable does not take the question very much farther, for if the "dominant" state is prepared to revise or abrogate the treaty, the advice is gratuitous, and if it is not prepared to do either, it can still take refuge in the plea either that the change of circumstances alleged is not sufficiently fundamental, or that they have not changed sufficiently—and as yet there is no international tribunal to take cognizance of such disputes.³

Accordingly it appears that from the standpoint of international theory, it is not universally agreed that the doctrine of *rebus sic stantibus* is part of International Law at all, and that those authorities who admit it do not agree concerning its scope or the effect of it when invoked.

II

The Doctrine in Practice.

A plain and uncontroversial instance of the application of the doctrine to obligations arising under treaties in the manner approved by international law occurs in Article 435 of the Treaty of Versailles, which recognizes that the stipulations of certain treaties of 1815, neutralizing one portion of Savoy, are no longer consistent with present conditions and the signatory Powers therefore accept the modifications agreed on by France and Switzerland, the states primarily concerned.⁴ Other cases, however, are less in consonance with principle.

By the Treaty of Paris, 1856, following the Crimean War, the

¹ *op. cit.*, p. 750.

² *Ibid.*, p. 751.

³ In the case of the Sino-Belgian Treaty of 1865, it will be seen that the Permanent Court had jurisdiction since the question of abrogation turned on the interpretation of an article in the treaty itself.

⁴ Sir J. Fischer Williams, *op. cit.*, pp. 96-7.

Black Sea was neutralized, and Russia undertook to exclude her warships (except certain small craft) from that sea. There was no time limit attached to such exclusion, which was therefore presumably intended to be permanent, although English statesmen at least were aware that Russia would not always acquiesce in the arrangement.¹

During the Franco-Prussian War, Russia announced by circular that she no longer considered herself bound by the restrictions of the treaty with respect to the Black Sea. Great Britain protested, and eventually the signatory Powers assembled in London in 1871 and declared that "it is an essential principle of the law of nations that no Power can liberate itself from the engagements of a treaty, nor modify the stipulations thereof, unless with the consent of the contracting Powers, by means of an amicable arrangement." Following this emphatic declaration, the Powers, because it was politically expedient, released Russia from further observance of the stipulations of the Treaty of Paris respecting the neutralization of the Black Sea.² As Hall ironically observes, "Russia, as the reward of submission to law, was given what she had affected to take."

Article 25 of the Treaty of Berlin, 1878, placed Bosnia and Herzegovina, while still subject to the suzerainty of Turkey, under the occupation and control of Austria Hungary. By Article 1, Bulgaria was also constituted an autonomous principality, but was also subject to Turkish suzerainty. In October 1908, the political situation proving favourable to Austrian ambitions, Austria Hungary declared that she had annexed Bosnia and Herzegovina, on the ground that these territories desired constitutional governments which could be more conveniently granted if they were removed entirely from Turkish control. Bulgaria also declared herself independent of Turkey, and although the actions of these two states were not relished by some, at least, of the European Powers, they were acquiesced in, this time without the empty pretence of a conference to cloak the obvious illegality.³

¹ On February 14, 1871, Lord Granville informed the House of Lords: "General Ignatieff told me that he remarked to Lord Palmerston, 'These are stipulations which you cannot expect will last long', and Lord Palmerston replied, 'They will last ten years'. A learned civilian, a great friend of mine, told me he heard Lord Palmerston talk on the subject, and say, 'Well, at all events they will last my life'. A noble peer, a colleague of mine, an intimate friend of Lord Palmerston, told him they would last seven years." (Morley, *Life of Gladstone*, II, p. 349.)

² See further, Hall, pp. 409-13; Oppenheim, I, pp. 751-2; *Cambridge History of Foreign Policy*, III, pp. 45-54; Morley, *Life of Gladstone*, Vol. II, Book VI, Chapter VI.

³ Hall, pp. 413-15; Oppenheim, p. 752; *Cambridge History of Foreign Policy*, III, pp. 402-12.

Again in 1914, Germany invaded Belgium, in spite of the fact that Belgium's perpetual neutrality had been guaranteed by the European Powers, including Prussia, in 1839. One of the grounds for this action was alleged to be that the conditions prevailing at the time of the neutralization of Belgium in 1831 had totally changed by 1914, and Belgium, instead of being the feeble state she was in 1831, had become a strong military state with large possessions many times the size of the mother country, outside Europe. Such a specious argument has been generally condemned by the text-books,¹ and was unqualifiedly denounced by the European Powers in opposition to Germany. There can be little doubt, however, that the German Government must have been conscious in 1914 of the successful practical consequences of the appeal to the doctrine of *rebus sic stantibus* in 1871 and 1908; and that there was a tendency among certain European states, before 1914, to regard a treaty as binding only while it was expedient or profitable to observe it; and that, finally, the loose enunciation of the doctrine in some Continental text-books to some extent contributed to this cynical view of treaties.

In 1911, Turkey (acting perhaps on the Russian precedent of 1871) declared that consular jurisdiction in Turkish dominions was abolished. The Powers replied that Turkey had no right to adopt such a course without first securing the consent of the Powers concerned. During the War, Turkey made further efforts to effect such an abolition, urging that reforms in Turkish law had made the retention of extraterritoriality unnecessary. These claims were also not admitted by the Powers concerned.² Nevertheless, at the first Lausanne Conference (1922-3), Turkey defended her wartime action, again on the ground of *rebus sic stantibus*. Subsequently, following much negotiation, the capitulations were abolished by bilateral agreement.³ This was also the method by which extraterritoriality was abolished in Japan, Siam, and Persia.

III

The Denunciation of the Chinese Treaties.

A. Conditions governing the Exercise of Extraterritoriality in China.

From the first it was realized by the Powers concluding treaties with China that extraterritoriality was not a permanent institution, and their representatives lost no opportunity of pointing out

¹ See especially Garner, *International Law and the World War*, II, pp. 217-21.

² Shih Shun Liu, *Extraterritoriality*, pp. 175-8.

³ *Ibid.*, Chapter X.

to the Chinese the necessity of reforming Chinese law. When a clear intention on the part of the Chinese to effect such a purpose became apparent, the Treaty Powers were prepared to give assurances that extraterritoriality would be abandoned when sufficient progress had been made. Thus, Article 12 of the Sino-British Commercial Treaty of 1902 contains the assurance that Great Britain will give China every assistance in the process of law reform, and will be prepared to relinquish extraterritoriality when the state of Chinese law warrants it.¹ Article 15 of the Commercial Treaty of 1903 between China and the United States,² and Article 11 of the Commercial Treaty of 1903 between China and Japan³ contain similar promises. By Article 10 of the Treaty of 1908 between Sweden and China, Sweden promised to relinquish extraterritorial rights as soon as the other Treaty Powers did,⁴ and the same promise was made by Switzerland in the treaty with China of June 13, 1918.⁵ In an exchange of notes between China and Mexico in 1921, Mexico promised that when the Treaty of 1899 was amended, a clause renouncing extraterritoriality by Mexico in China would be inserted,⁶ whilst in an exchange of notes following the Sino-Norwegian Treaty of November 12, 1928, the Norwegian Minister declares that he is "confident that the friendly attitude of my Government will not be found to have changed when the question of revising the whole treaty of 1847 on the basis of equality and mutual respect for sovereignty is brought up for consideration".⁷ The new treaties with Italy and Belgium are noticed in the next sub-section.

At the Washington Conference in 1922, eight Powers—the United States, Belgium, the British Empire, France, Italy, Japan, the Netherlands, and Portugal—agreed to relinquish extraterritorial rights as soon as the state of Chinese law warranted it, and they resolved to appoint a Commission

"to enquire into the present practice of extra-territorial jurisdiction in China, with a view to reporting to the Governments of the several Powers above named their findings of fact in regard to these matters and their recommendations as to such means as they may find suitable to improve existing conditions of the administration of justice in China, and to assist and further the efforts of the Chinese Government to effect such legislation and judicial reforms as would warrant the several Powers in relinquishing either progressively or otherwise their respective rights of extra-territoriality."

¹ *Chinese Customs Treaties*, I, 557.

² *Ibid.*, Vol. II, p. 662.

³ *Report of Extrat. Commission*, p. 12.

⁷ *The Times*, November 27, 1928.

² *Ibid.*, p. 756.

⁴ *Ibid.*, Vol. II, p. 105.

⁶ *Ibid.*

Denmark, Peru, Spain, and Sweden subsequently adhered to this resolution and were represented on the Commission. All the foregoing Powers, therefore, have explicitly agreed to relinquish extraterritoriality in China so soon as the condition of Chinese law warrants it.

The Commission, after completing its survey of Chinese law in 1926, was unable to recommend that extraterritoriality should be immediately relinquished. On the other hand, it mentioned a number of points on which judicial administration in China still left much to be desired, and pointed out that when these matters had been remedied, extraterritoriality could be abandoned.¹

Finally, the British Memorandum of December 18, 1926, to the Powers represented at Washington in 1922 observes:

“His Majesty’s Government attach the greatest importance to the sanctity of treaties, but they believe that this principle may best be maintained by a sympathetic adjustment of treaty rights to the equitable claims of the Chinese.”

The cumulative effect of these declarations is therefore to give China an indubitable right to raise the question of treaty-revision, as soon as she thinks that changed conditions warrant such a course, but they nowhere confer on China, expressly or impliedly, a right to terminate a treaty by unilateral denunciation.

B. *General Attitude of the Nationalist Government of China.*

The consistent attitude of the Chinese Government during the present century has been to limit the operation of extraterritoriality in China, and in pursuance of this object, the right has been denied to all Western nations who have asked for a grant of extraterritoriality since 1900, with the single exception of Switzerland, who gained it in 1918. Further, Germany lost her extraterritorial rights in China by the Treaty of Versailles, Austria and Hungary by the Treaty of Saint-Germain, and Russia by a declaration of 1921, and later by formal agreement in 1924. Again, in 1908, China denounced the *protégé* system, in virtue of which great extraterritorial Powers claimed and exercised jurisdiction over subjects of lesser non-extraterritorial Powers, and in consequence this practice has now been relinquished. More recently, China has objected to the facility with which certain consuls of extraterritorial Powers have granted certificates of nationality to persons of Chinese race and companies composed exclusively of

¹ *Report, Part IV.*

Chinese, with the result that this practice is now more strictly regulated than formerly. In all these matters, although the extent of extraterritoriality has become narrower than it was before, no questions of International Law arise.

In 1927-8, however, the Nationalist Government assumed control of the whole of China, and shortly afterwards, on June 16, 1928, it published a declaration which, after adverting to the ideals dominating the founders of the new Government, declared:

"To realize its hope of a new state, the Nationalist Government must put its international relations on a new basis. For eighty years China has been under the shackles of unequal treaties. These restrictions are a contravention of the principle in international law, of mutual respect and sovereignty, and are not allowed by any sovereign state. Hence China has asked in various declarations for a sympathetic understanding by friendly nations. We are pleased to note that since the latter part of 1926 the spokesmen of the foreign Powers have expressed their willingness to negotiate new equal treaties. Now that the unification of China is being consummated we think the time is ripe for taking further steps and begin at once to negotiate—in accordance with diplomatic procedure—new treaties on a basis of complete equality and mutual respect for each other's sovereignty. . . .

"The Nationalist Government wishes to make to the friendly Powers a further declaration that it will not disregard, nor has it disregarded, any international responsibility in consequence of agreements and understandings properly and legally concluded and on a basis of equality. When the treaty restrictions are removed the mutual assistance, morally as well as materially, that may be rendered between China and other Powers will no doubt enhance the progress of civilization of the world."¹

Two points in the foregoing declaration require brief notice. In the first place, the phrase "unequal treaties" is employed more than once. Its exact significance is difficult to discover. Vattel, in his chapter on "Treaties"² employs the term in a sense which might conceivably conform to the second of the meanings given below.

As far as any meaning at all can be assigned to it in the Chinese Declaration, it would appear to mean either:

(1) Treaties concluded when the contracting Powers were in an unequal position, e.g. at the end of a war in which China was vanquished. But treaties so concluded are unquestionably binding, and in any case, the majority of treaties concluded with China last century were not made in consequence of the application of any force at all; and this is especially true of those treaties which China has recently denounced and which will be considered shortly.

¹ *Chinese Social and Political Science Review*, July, 1928. Public Documents Supplement, p. 48.

² *Law of Nations*, trans. J. Chitty, 1834, Book II, Chapter XII.

(2) Alternatively, the phrase might be construed to mean that the treaties were unequal in the advantages conferred on one side. But it can hardly be seriously contended that such treaties are not binding, otherwise all treaties of peace would be worthless.

It is important to attempt to discover what the phrase implies, since the declaration states that all *equal* treaties concluded by China have been and will be faithfully observed, leaving her attitude towards the remainder unspecified.

On July 8, 1928, the Ministry of Foreign Affairs of the Nationalist Government published a statement in which, after pointing out that the consistent policy of the Nationalist Government had always been to seek the establishment of new treaties between China and foreign Powers upon a basis of equality, the Ministry observed:

“While they will continue to afford protection to foreign lives and property in China according to law, the Nationalist Government hereby make the following specific declaration with regard to all unequal treaties:

(1) All unequal treaties between the Republic of China and other countries which have already expired shall *ipso facto* be abrogated and new treaties shall be concluded.

(2) The Nationalist Government will immediately take steps to terminate, in accordance with proper procedure, those unequal treaties which have not yet expired, and conclude new treaties.

(3) In the case of the old treaties which have already expired but have not yet been replaced by new treaties, the Nationalist Government will promulgate appropriate regulations to meet the exigences of the situation.”¹

The sense in which any of the foreign treaties with China could be said to have “expired” will be considered in the next section. As to the treaties being said to be “unequal” (in the second sense of the term), the special advantages (common to all the treaties) contemplated by the Chinese as infringing the principle of equality were in 1928 reduced to two—extraterritoriality and tariff limitation by the Treaty Powers, and the second of these advantages was not seriously in dispute. Virtually, therefore, the chief question at issue was China’s asserted right to terminate extraterritorial jurisdiction, by abrogating the treaties on which it was based.² The Interim Regulations, also published by the Chinese Ministry for Foreign Affairs on July 8, declared that foreigners belonging to those states whose treaties China had terminated were subject to the jurisdiction of Chinese courts.³

¹ *Chinese S. & P.S.R.*, July 1928. P.D. Suppt., pp. 48–9.

² In some cases, however, e. g. Great Britain, extraterritoriality is also based on usage. See further, Keeton, *Extraterritoriality in China*, Chapters II and IV.

³ *C.S. & P.S.R.*, July, 1928. P.D. Suppt., p. 49.

C. *The Denunciation of Certain Treaties by China.*

1. *The Belgian Treaty of 1865.* The first example of the application by the Chinese Government of the policy outlined in the declarations noted above occurred in 1926, before the declarations had been published (and incidentally before the Nationalist Government replaced its rivals in the government of China), in respect of the Sino-Belgian Treaty, concluded in 1865. With regard to this treaty the following circumstances should be noted:

(1) By virtue of it, China concedes the usual special privileges including extraterritoriality.

(2) It was not concluded in consequence of the application of force by either party, since China and Belgium have never been at war.

(3) When Belgium sought to conclude a treaty of this type in 1845, after the first Anglo-Chinese War, China refused, but freely conceded the right of extraterritoriality and other rights secured to foreign Powers under existing treaties.¹

(4) The importance of the privileges conferred by the treaty, from the Chinese point of view, was not great, for in 1925 there were only 549 Belgian subjects and 25 Belgian firms in China, as compared with 15,247 British subjects, and 718 British firms, and 218,351 Japanese subjects (or, including Koreans, over a million) and 4,708 Japanese firms.²

Article 46 of the Sino-Belgian Treaty provides:

“Si dorénavant le Gouvernement de sa Majesté le Roi des Belges jugeait utile d'apporter des modifications à quelques-unes des clauses du présent Traité, il sera libre à cet effet d'ouvrir des négociations après un intervalle de dix années révolues à partir du jour de l'échange des ratifications, mais il faut que six mois avant l'expiration de dix années il fasse connaître officiellement au Gouvernement de Sa Majesté l'Empereur de la Chine son intention d'apporter des modifications, et en quoi elles consisteront. A défaut de cette annonce officielle, le Traité restera en vigueur sans changements pour un nouveau terme de dix années, et ainsi de suite de dix années en dix années.”³

From this article it seems clear that the right to raise any question concerning the modification of the treaty belonged to Belgium alone, and that if Belgium failed to give notice, six months before the expiration of a ten years' period of any proposal to introduce changes, the treaty continued as before. Notwithstanding this, however, the Chinese Government, on

¹ Morse, *International Relations of Chinese Empire*, I, 332, and Keeton, *Extraterritoriality*, I, 248.

² *Report of the Extraterritoriality Commission*, p. 25.

³ *Treaties and Conventions between China and Foreign States*, II. 21.

April 16, 1926, informed the Belgian Minister at Peking that China proposed to terminate the treaty of 1865 at the end of the decennial period expiring October 27.¹ To this the Belgian Minister replied, on April 27, that while, under Article 46, the right of revision belonged to Belgium alone, the Belgian Government was prepared to consider, in principle, the question of revision, but proposed to wait for the reports of the Customs Conference and Extraterritoriality Commission.² The only reply of the Chinese Government was that they would consider the treaty terminated on October 27, no matter what the reports of the Conferences declared. In the event of a new treaty not being concluded by October 27, China undertook to consider the possibility of finding a provisional *modus vivendi* "which, while safeguarding the legitimate interests of Belgium, will in no way impair the inherent rights of China."³ The provisional *modus vivendi* proposed by China included the recognition of the principle of tariff autonomy for each country (Article 2), and the relinquishment of Belgian extraterritorial rights in China, but "as a provisional measure and with a view to the carrying into effect of the above-mentioned principle (i. e. of territorial jurisdiction) China agrees, for the time being, to tolerate temporarily the maintenance of the *status quo* of the consular jurisdiction of Belgium in China, with the understanding that Belgium agrees to the formal renunciation of its consular jurisdiction in China in the new treaty to be concluded" (Article 3).⁴

On August 4, the Belgian Minister repeated his former contention concerning Article 46 of the treaty, but added that since China and Belgium had both accepted the obligatory jurisdiction of the Permanent Court of International Justice in matters arising out of the interpretation of treaties, Belgium was prepared to submit the question of interpretation to that tribunal,⁵ an offer which was repeated on September 29, on which date the Belgian Minister also informed the Chinese Government that the proposed *modus vivendi* was unacceptable.⁶ As an alternative, the Belgian Minister proposed a *modus vivendi* to include the "most favoured nation" clause for (a) merchandise; (b) the status of Belgian subjects in China; and (c) navigation, reserving the final settlement of the question of extraterritoriality and tariffs until the reports of the Commission and the Conference were published, Belgium to retain

¹ *C.S. & P.S.R.*, 1926, Pub. Doc. Suppt., pp. 8-11.

² *Ibid.*, pp. 11-12.

⁴ *Ibid.*, pp. 17-18.

³ *Ibid.*, 12-14.

⁵ *Ibid.*, p. 16.

⁶ *Ibid.*, pp. 18-19.

consular jurisdiction "so long as the two Governments shall continue to benefit therefrom."¹

The reply of the Chinese Government, on October 23, took the form of a revised *modus vivendi*; providing for the termination of the treaty of 1865 on October 27, the conclusion of a new treaty "on the basis of equality and mutual respect for territorial sovereignty" within six months, during which period Sino-Belgian relations were to be regulated by the "most favoured nation" principle, except as regards jurisdiction over Belgians in China, in respect of which China and Belgium were to formulate a scheme jointly.² Belgium was prepared to accept a *modus vivendi* of this type, except that she was not prepared to agree to conclude a new treaty within six months, since the Belgian position would be greatly prejudiced if, at the expiration of that period, Belgium was still treatyless.³ China, on the other hand, insisted on the six months' limit, since she attached great importance to the conclusion of a new treaty on the basis of equality, and "the proposed modifications made by the Belgian Government would give the impression that Belgium is inclined to continue indefinitely the *modus vivendi* under consideration thereby causing delay to the conclusion of a new treaty."⁴

To this the Belgian Minister replied that Belgium had not stood upon the letter of her rights under the treaty of 1865, but had agreed to the principle of revision by mutual agreement; but Belgium could not accept a *modus vivendi* which conferred rights for a limited period, since that period might expire without any new treaty being concluded, and the Belgian position would consequently be greatly prejudiced. Moreover, the Belgian Minister "is prepared to recommend to his Government that the *modus vivendi* should not in any case be prolonged after the Great Powers had concluded new treaties with China. Since these proposals have proved unacceptable to China, Belgium has been compelled to raise once more the question of submitting the interpretation of Article XLVI to the Permanent Court."⁵

On the receipt of this reply, the Chinese Government declared the treaty of 1865 terminated,⁶ without acknowledging the Belgian proposal to submit the question of interpretation to The Hague. From this, the Belgian Government deduced that their proposal had been rejected, and pointed out that if China declined to join with Belgium in drawing up a *compromis* for appealing to

¹ C.S. & P.S.R., 1926, Pub. Doc. Suppt., p. 21.

³ *Ibid.*, p. 26.

⁴ *Ibid.*, p. 27.

⁵ *Ibid.*, pp. 30-3.

² *Ibid.*, pp. 22-3.

⁶ *Ibid.*, p. 34.

the Permanent Court, Belgium would be compelled to adopt the second mode of procedure prescribed in Article 40 of the Protocol of December 11, 1920, and bring the appeal unilaterally.¹ To this the Chinese Foreign Ministry replied that it could not agree to submit the dispute to the Permanent Court, in a note which included the two following paragraphs:

“As regards the proposal of the Belgian Government to bring the question of the interpretation of Article 46 of the treaty of 1865 before the Permanent Court of International Justice, the Chinese Government, mindful of their obligations under Article 36 of the Statute of the said Court, would be prepared to discuss the possibility of invoking jointly with the Belgian Government the services of this highest international tribunal, if the Belgian Government had indicated a willingness to seek a solution on the broad basis of the universality of equality in international intercourse and that of *ex aequo et bono*. For the point at issue between the two governments is not the technical interpretation of Article 46 of the Treaty of 1865, an article which is a striking symbol of the inequalities in the entire instrument. This technical point had more than once been waived by the Belgian Government when it agreed to put an end to the treaty of 1865 and conclude a new one to take its place. The real question at bottom is that of the application of the principle of equality of treatment in the relations between China and Belgium. It is political in character and no nation can consent to the basic principle of equality between states being made the subject of a judicial inquiry. A submission of the question of interpretation of Article 46 of the treaty of 1865 to the aforesaid Court would serve merely to stress Belgium's desire to maintain in her favour the régime of inequality in China, and would in no way remove the obstacle which had stood in the way of the successful completion of the recent negotiations.”

“It was in the interest of good understanding and co-operation between China and Belgium that the Chinese Government have declared the treaty of 1865 as terminated upon the expiration of the specified decennial period. This declaration is in conformity with the spirit of Article 19 of the Covenant of the League of Nations, which clearly recognizes the fundamental principle of *rebus sic stantibus* governing international treaties which have become inapplicable. Consequently, if an appeal is to be made to an international tribunal at all, the Chinese Government believe that it should be brought before the Assembly of the League by virtue of Article 11 of the Covenant.”²

The above paragraphs contain a number of plausible diplomatic contentions, few of which would stand the test of modern International Law. The only point at issue between Belgium and China was unquestionably the interpretation of Article 46 of the treaty of 1865, since China's claim to exercise a right which was not conferred by that article had initiated the whole negotiations. To say that the treaty was unequal, and that the article was “a striking symbol” of inequality may be good diplomatic rhetoric, but it is legally valueless. The treaty conferred certain legal rights upon

¹ *Ibid.*, pp. 38-9.

² *Ibid.*, pp. 40-1.

one signatory. It also gave that signatory alone the right to say when revisions were desirable. To say that the real question in issue was "political in character" is to say that all legal relations between states are the result of certain political circumstances—scarcely an epoch-making discovery. Further, Article 19 of the League Covenant does not clearly recognize the principle of *rebus sic stantibus*, which, if admitted within the field of international law, is essentially of general application to all treaties if the specific circumstances contemplated exist. Article 19 of the Covenant, on the other hand, declares that the Assembly may from time to time advise the reconsideration by Members of treaties which have become inapplicable, and the consideration of conditions whose continuance might endanger the peace of the world—a far more modest enterprise. Further, it can scarcely be contended that the interpretation of an article of a treaty comes within the scope of this article of the Covenant, when the Permanent Court was established to consider situations of precisely the type of that which now existed between China and Belgium. Finally, it should be noticed that although China refers to the doctrine of *rebus sic stantibus* by name for the first time in this communication, it has been clearly implied in all previous communications, although no reasons why it should apply to this situation are advanced. In a covering statement, issued by the Chinese Government when the correspondence was published, appears the following:

"It need hardly be emphasized, no nation mindful of its destiny, and conscious of its self-respect, can be fettered for ever by treaties which shackle its free and natural development and which are repugnant to the best traditions of international intercourse. Fruitful sources of misunderstanding and conflict, they are in their very nature bound to come to an end sooner or later. To endeavour to preserve them in the face of radically changed conditions and against the progress of modern international thought and life is to forget history and its teachings."¹

With respect to the first sentence of the above, Belgium was a party to the declaration of the Powers at Washington in 1922, which stated that the Powers would relinquish extraterritorial rights in China when the condition of Chinese law justified it. There can thus be no question that Belgium—or any other of the Powers represented at Washington—contemplated retaining extraterritoriality in China "for ever". Furthermore, extraterritoriality is not "repugnant to the best traditions of international intercourse", but the accepted method of entering into treaty-relations

¹ *C.S. & P.S.R.*, 1926, Pub. Doc. Suppt., p. 7.

with an Eastern Power whose jurisdiction is not so far developed that it can be recognized by western states.¹ The only possible line of argument open to the Chinese Government, as far as the doctrine of *rebus sic stantibus* was concerned was that extraterritoriality was imposed in the nineteenth century because Chinese jurisdiction could not be accepted by Western Powers for their subjects, and that that jurisdiction had improved to such an extent then that extraterritoriality had become an unnecessary burden. But this contention could not be advanced, since the Report of the Extraterritoriality Commission, issued in the same year as the Sino-Belgian negotiations, had declared that no material modifications in the system of extraterritoriality in China could be proposed.

In 1927, Belgium unilaterally brought the question of the interpretation of Article 46 of the treaty of 1865 before the Permanent Court of International Justice, which on January 8 made a provisional order, securing to Belgium her rights under the treaty of 1865, with regard to protection of persons, property, and shipping, and to extraterritorial jurisdiction until the Court arrived at a final decision.² Meanwhile China and Belgium had reopened negotiations, with the result that on February 3, 1928, Belgium notified the Permanent Court that China had declared her willingness to apply to Belgium a provisional régime acceptable to Belgium, and that Belgium accordingly requested the Court to revoke the Order of January 8. This was done on February 15, with the consequence that the Treaty of 1865 "would provisionally cease to be operative as regards these rights, which could not, therefore, no matter what the tenor of the Court's final judgment may be, serve as a basis for any claim enforceable at law and put forward on the ground of some violation of these rights during the period for which the new régime agreed upon between the parties might be applicable."³ Finally, on June 18, the Permanent Court made a further order extending the time for the submission of China's case to February 15, 1928, of Belgium's reply thereto to April 1, and of China's rejoinder to May 15, 1928, as the negotiations between China and Belgium had not yet resulted in the conclusion of a new treaty.⁴

On February 21, 1928, the Court extended the time for the presentation of China's case until August 15, 1928, for Belgium's counter-case until October 1, and for China's rejoinder thereto

¹ On this point, see Keeton, *Extraterritoriality in China*, Ch. XI, and Shih Shun Liu, *Extraterritoriality*.

² *C.S. & P.S.R.*, April, 1928, P.D.S., pp. 26-8.

³ *Ibid.*, p. 30.

⁴ *Ibid.*, pp. 31-3.

until November 15; and on August 13, these dates were again extended until February 15, 1929, April 1, 1929, and May 15, 1929, respectively.¹

On November 22, 1928, China and Belgium signed a new treaty, containing the most-favoured-nation clause (which does not apply to extraterritoriality). Article 2 of this treaty states that nationals of each contracting party shall be subject to the local jurisdiction; but in an accompanying note it is provided that Article 2 shall not be operative till January 1, 1930, before which date China agrees to make further provision for the assumption of jurisdiction over Belgians. "Failing such arrangements by the said date Belgians shall thereafter be amenable to Chinese laws and jurisdiction as soon as a majority of the Powers possessing extraterritorial privileges shall be agreed to relinquish them."²

Reviewing these negotiations between China and Belgium, extending over two years, the conclusion seems to be that China used the doctrine of *rebus sic stantibus* as a lever with which to compel Belgium into negotiations for revision of the treaty of 1865, since no other mode of effectively initiating proposals for revision was open to China. At the same time it seems clear that the Chinese Government was conscious of the fact that no good case in law could be founded upon the doctrine—otherwise it would have been urged before the Permanent Court, when Belgium stated her case. What eventually occurred was that the treaty of 1865 was abrogated by mutual consent, the doctrine of *rebus sic stantibus* being ignored after the early stages of the negotiations.

II. *The Spanish Treaty of 1864.*

The remaining treaties denounced by China can be considered more briefly. Article 23 of the Sino-Spanish Treaty of October 10, 1864, states:

"Either of the two High Contracting Parties may at the end of ten years ask

¹ Manley O. Hudson, "Seventh Year of the Permanent Court of International Justice," *A.J.I.L.*, January, 1929, pp. 19-20.

On February 14, 1929, the Registrar of the Permanent Court received from the Agent of the Belgian Government a communication that "the dispute between Belgium and China was virtually settled in consequence of the conclusion of a preliminary treaty signed at Nanking on November 22, 1927, and which would shortly be ratified. The Agent, therefore, announced that Belgium wished to discontinue proceedings, and asked the Registrar to remove the suit from the Court's list of cases. In reply, the Registrar informed the Agent that the President of the Court, on receipt of Belgium's request, preferred to leave it to the Court itself, at its meeting on May 15, 1929, to record Belgium's intention to discontinue proceedings (*League of Nations Monthly Summary*, March 15, 1929, p. 68).

² *The Times*, November 30, 1928; *C.S. & P.S.R.*, January, 1929, P.D.S., pp. 8-11.

for a revision of the tariff or the commercial articles of this treaty, with the understanding that if such request be not made within six months, reckoned after the first ten years, the said tariff will continue to be in force for ten years longer, reckoned in addition to the preceding ten years, and so on every ten years.”¹

Purporting to act in accordance with this article, the Chinese Government notified the Spanish Minister in 1926 that it would consider the Sino-Spanish Treaty of 1864 terminated as from May 10, 1927—a date which was subsequently postponed to November 10, 1927, in consequence of the fact that Spain took the view that according to the Spanish text of the treaty, it could not be revised until the later date.² As in the case of the Belgian treaty, Spain was prepared to admit that some revision of the articles of the treaty might be undertaken, but pointed out that only the tariff and commercial articles were comprehended within Article 23, whilst the other articles remained in force until the conclusion of a new treaty.³

To this China replied:

“Since the treaty of 1864 was one primarily for commercial intercourse and most of its articles directly or indirectly had a bearing on this intercourse, such articles as appeared to be exceptions are equally no more compatible with the changed conditions of to-day. Therefore, in the interest of better understanding and with a view to promoting a closer friendship between the two countries, the Chinese Government considered the proposed differentiation as infeasible and held the view that it was most desirable to replace the entire treaty with a new agreement.”⁴

It may be pertinently asked, why did the framers of the treaty take the trouble of stating that the commercial or tariff articles of the treaty were revisable at the end of ten years, if what they really meant was that any or all the articles were so revisable? A further point is that the articles were said to be *revisable*. Nothing is said about termination.

The subsequent negotiations need not be traced in detail. The Spanish Government was unable to accept the Chinese interpretation of Article 23 of the treaty,⁵ but the issue was not pressed, and a new treaty between the two Powers, following the Belgian model, was signed on December 27, 1928, a subsequent exchange of notes making identical provision for the relinquishment of exterritorial rights by Spain in 1930.⁶

¹ *Chinese Customs Treaties*, II. 382.

² *C.S. & P.S.R.*, Jan. 1928, P.D.S., p. 2.

³ *Ibid.*, p. 3.

⁵ *Ibid.*, p. 6.

⁶ *C.S. & P.S.R.*, Jan. 1929, P.D.S., pp. 47–51.

Ibid., pp. 3–4.

The Italian Treaty.

Article 26 of the Sino-Italian Treaty of October 26, 1866, states:

"It is agreed that either of the High Contracting Parties to this treaty may demand a further revision of the tariff and of the commercial articles of this treaty at the end of the month of June, 1878. But if no demand be made on either side within the six months following the above date, then the tariff shall remain in force for ten years more from that date; and so it shall be at the end of each successive ten years."¹

It is therefore clear that Italy's position was identical with that of Spain, although the differentiation between commercial and other articles is a little clearer in Article 26 of the Italian Treaty.

On July 1, 1928, China declared this treaty also terminated as a whole, claiming the right under Article 26 of the treaty, and basing the exercise of this claim upon the fact that "conditions prevailing at the time of the conclusion of the Sino-Italian Treaty October 26, 1866, have radically changed",² and asking for the conclusion of a new treaty on the usual basis of equality. To this the Italian Minister replied:

"I contest the right of the Nationalist Government to declare the treaty abolished and no longer in force from June 30th last. The Chinese Government have indeed the right to ask, within six months from that date, for the revision of the tariff and commercial articles, but they have not the right to declare the treaty to have expired. . . .

"I must therefore make formal reservation with regard to the rights deriving from the treaty, which my Government continues to consider valid until it shall be substituted by a new treaty concluded by mutual consent. If, in the meanwhile the Chinese Government should not observe its obligations arising from the treaty, my Government might feel bound to protect their interests and the interests of their nationals by such means as they may consider opportune."³

After observing that the Italian Government was prepared to enter into negotiations for the conclusion of a new treaty, the note continues:

"The Italian Government are prepared to base the new treaty on the mutual concession of the most-favoured nation treatment. Therefore if, on the one hand, the Italian Government have no objection to open promptly, and in a friendly spirit, negotiations for the revision of the treaty as a whole, on the other hand they intend that Italian citizens or companies (in respect to consular jurisdiction) and Italian import and export trades (in respect to customs tariff) should not ever receive a treatment less favourable than that enjoyed in China by the citizens and by the trade of any other country. Therefore I must declare from this moment that the new instrument should embody a suspending clause to the effect that

¹ *Chinese Customs Treaties*, II. 445.

² *C.S. & P.S.R.*, July 1928, P.D.S., p. 65.

³ *Ibid.*

the stipulations of the Italo-Chinese Treaty about to be concluded will come into force only after all the Powers signatory to the Washington Agreement shall have adjusted on a new foundation the diplomatic instruments which bind them to China.”¹

On November 27, 1928, a new treaty between Italy and China was signed. Its terms closely followed those of the new Sino-Belgian Treaty, except that the notes accompanying the treaty, and qualifying the surrender of extraterritoriality enjoyed by Italy in China, definitely postpone the abolition of the right until China has reached an agreement with all the Powers signatory of the Washington Treaties, also surrendering their extraterritorial rights in China.²

The Portuguese Treaty.

Article 46 of the Sino-Portuguese Treaty of December 1, 1887, states:

“It is agreed that either of the High Contracting Parties of this treaty may demand a revision of the tariff, and of the commercial articles of this treaty, at the end of ten years; but if no demand be made on either side within six months after the end of the first ten years, then the tariff shall remain in force for ten years more, reckoned from the end of the preceding ten years; and so it shall be at the end of each successive ten years.”³

As in the case of the Italian treaty, the Chinese Government claimed that this article conferred on them the right to denounce the treaty as a whole on April 28, 1928, and attempted to apply to the relations between the two countries the provisional regulations which they had elaborated for such cases. To this the Portuguese Government replied:

“Neither the letter nor spirit of the treaty contain any disposition that would imply that it expired on the 28th April, 1928, this date marking merely, according to Article 46, the limit of a period of ten years at the end of which either of the

¹ *Ibid.*, p. 66. The denunciation of the Italian Treaty produced awkward consequences at the Shanghai Provisional Court, where the Senior Consul and the Consul of the Powers with extraterritorial rights in China have a right to send a deputy in turn to sit on the bench with the Chinese magistrate. After the denunciation of the Italian Treaty, Signor Ramondino, the Italian Consul's deputy, attempted to take his seat as usual. The Chinese magistrate attempted to prevent him, alleging he had no *locus standi*. The Italian deputy persisted in his claim, but the matter was provisionally settled, by his being appointed to sit as the Senior Consul's deputy (*The Times*, July 21, 1928). The question was solved when a new treaty between Italy and China was concluded.

² *The Times*, December 1, 1928. *C.S. & P.S.R.*, January, 1929, P.D.S., 13-17.

³ *Chinese Customs Treaties*, II. 290.

High Contracting Parties are entitled, within six months, to demand a revision of tariff and commercial Articles exclusively.

"The changes of political, economical or commercial conditions, claimed to have occurred in both countries, are not of a nature to entitle China to dissolve the treaty by unilateral withdrawal.

"Under such pertinent conditions and relevant circumstances the Portuguese Government can but rebut the statement that the Sino-Portuguese Treaty of December 1st, 1887, is no longer in force and refuse to acquiesce in the imposition of the provisional regulations."

The Portuguese Government, however, expressed its willingness to open negotiations for the conclusion of a new treaty,¹ which was concluded on December 19, 1928, with the usual provision, in the subsequent exchange of notes, for the relinquishment of extraterritoriality in 1930.²

The Japanese Treaties.

Article XXVI of the Sino-Japanese Treaty of Commerce and Navigation of 1896 states:

"It is agreed that either of the High Contracting Parties may demand a revision of the tariffs and of the commercial articles of this treaty at the end of ten years from the date of the exchange of the ratifications; but if such demand be made on either side and no such revision be effected within six months after the end of the first ten years, then the treaty and tariffs in their present form shall remain in force for ten years more, reckoned from the end of the preceding ten years, and so it shall be at the end of each successive period of ten years."³

The Supplementary Commercial Treaty of 1903 does not mention revision or termination. On July 20, 1928, China declared both these treaties terminated, and sought to apply the Provisional Regulations to Japan. The Japanese reply was uncompromisingly firm, and unassailable from the standpoint of international law:

"There is no stipulation providing for the abrogation or expiration of the treaty (i. e. of 1896). It is natural, therefore, that the treaty can neither be abrogated nor terminated without special mutual consent or agreement between both Contracting Parties. Further, as it is expressly stipulated in the provisions of the same article (26) that if the negotiations for revision were not completed within six months, then the treaty and tariffs should remain in force for ten years more, it admits of no doubt that the treaty and tariffs should remain in force another ten years.

"The Japanese Government having consistently held the above view, made it clearly known to the Wai Chiao Pu of the Peking Government in the Memorandum of the Japanese Government in reply to that Ministry's proposal for the revision

¹ *C.S. & P.S.R.*, October, 1928, P.D.S., p. 75.

² *C.S. & P.S.R.*, January, 1929, P.D.S., pp. 21-8.

³ *Chinese Customs Treaties*, II, p. 613.

of the Treaty of Commerce and Navigation, and they have never failed to remind the Chinese authorities thereof on several subsequent occasions when the term for treaty negotiations was renewed.

"The treaties and the accompanying documents being, for the above reasons, still in force after the expiration of the term for treaty negotiations on July 20th last, the Japanese Government deem it impossible to share the view of the Nationalist Government that the expiration of the term for treaty negotiations coincides with the expiration of those treaties.

"Moreover in their note, the Nationalist Government maintain to rule during the interim period before the conclusion of a new treaty, with the so-called 'Provisional Regulations' which have been unilaterally drawn up by them, bringing into practice the termination of present treaties still in force. It is, on the part of the Nationalist Government, not only an infringement of the terms of the treaty, which is inadmissible in the light of both treaty interpretations and international usages, but also an outrageous act disregarding good faith between the nations in which the Japanese Government find themselves absolutely unable to acquiesce."

The Note further points out that while Japan is prepared to consider the question of revising the treaties, yet if China insists on considering the treaties as abrogated, and attempts to apply to Japanese subjects in China the "Provisional Regulations", then the Japanese Government "may be obliged to take such measures as they deem suitable for safeguarding their rights and interests assured by the Treaties."¹

The French Conventions.

In July, 1928, the Chinese Government announced its intention of terminating the Sino-French Convention of 1886 and the two Supplementary Conventions of 1887 and 1895, all relating to the regulation of frontier trade between French Indo-China and China. The article under which the Chinese Government claimed to take action was Article 18, which said:

"Les présentes stipulations pourront être, aux termes de l'Article 8 du Traité du 9 juin 1885, révisées dix ans après l'échange des ratifications."²

Article 8 of the Treaty of Tientsin, 1885, gave the usual right to both parties to ask for a revision of the commercial articles of the treaty at ten-year intervals from the exchange of ratifications. Failing six months' notice before the expiration of any interval, the articles of the treaty were to remain in force for another ten years.

The French Minister's reply to China's claim to denounce these conventions was an emphatic denial of China's right to abrogate

¹ *C.S. & P.S.R.*, October, 1928, P.D.S., 73-4.

² *Chinese Customs Treaties*, I. 924.

them, more especially as France had agreed to limited revision (i. e. of the commercial articles) in principle. Particularly, the French Government declined to recognize the "Provisional Regulations" which the Chinese Government proposed to apply to Oriental subjects of France, whose special legal status was determined by the conventions.¹

The Danish Treaty of 1863.

The Treaty of Tientsin between China and Denmark, signed in 1863, provided that the tariff and commercial articles should be revisable at the end of June, 1868, and decennially afterwards.² This treaty was also denounced as a whole by China on July 1, 1928, and the Danish Minister protested, denying China's right to abrogate it unilaterally, especially as Denmark had agreed to revision of the commercial articles in principle. A new treaty in the usual form was negotiated on December 12, 1928.³

IV

Conclusion.

It will have been noticed that although the Chinese Government referred vaguely to the doctrine of *rebus sic stantibus* at intervals throughout its negotiations with the Powers with whom China wished to conclude new treaties, no reasoned claim based on this doctrine was ever advanced, generalities only concerning "changed conditions" being inserted. It has been pointed out by an eminent authority, however, that in treaties conferring extraterritorial jurisdiction the doctrine may well have special application.⁴ There can be no question of this. To take a purely hypothetical case, assuming a state had entered into a treaty with China, whereby a grant of extraterritorial rights was conceded to that state, and no provision was made for the revision or abrogation of the treaty; assuming also that China's jurisdiction had advanced to such an extent that it was generally recognized by other states as suitable for their nationals in China; and that in spite of these circumstances the state still continued to exercise extraterritorial jurisdiction in China, there can be no question that

¹ *The Times*, July 20, 1928. In an annex to the Sino-French Customs Treaty of December 22, 1928, France announces that she is prepared to negotiate a new treaty in place of these conventions "without delay".

² *Chinese Customs Treaties*, II. 321.

³ *C.S. & P.S.R.*, January, 1929, P.D.S., pp. 17-21.

⁴ Fischer Williams, *op. cit.*, p. 95.

the doctrine would be applicable to such a situation, and it might even be that, if then the state refused to renounce its rights after China had asked for them to be abrogated, China would be justified in disregarding them. But China was debarred from raising any such definite contention by the existence of the Report of the Extraterritoriality Commission, which refuted in advance the claim that China's jurisdiction had improved to the pitch that foreign Powers with extraterritorial rights in China required. With regard to the other rights conceded by the treaties there was no such obstacle, and, indeed, the Treaty Powers admitted the force of the Chinese request for revision. As far as tariffs are concerned, China's obligations under the treaties were due to the open corruption and extortion prevailing at all Chinese ports opened to trade last century, and to the existence of *likin*, or internal taxes on trade. To end these, the tariff was fixed by treaty and foreign goods were freed from liability to *likin*. Here, therefore, the Powers seem to be agreed that the conditions underlying these stipulations have fundamentally altered and that their continued existence is now unnecessary since new treaties have been negotiated conceding tariff autonomy.

Reverting, however, to the position of the parties to the negotiations which have been outlined above, it seems clear that in all cases (except in regard to the Belgian treaty) China had a right *conferred by the treaty*, to raise the question of the revision of the tariff and commercial articles. This was not disputed by any Power. It would also appear that according to the principles of International Law, China had a right at any time she pleased to open negotiations with any Treaty Power with the object of securing a revision of the other articles. Such revision, however, would not follow as of legal right. It was merely a suitable topic for diplomatic discussion. Further, if China could establish that the fundamental conditions underlying those obligations had changed, then China could press those negotiations, and, failing a satisfactory reply, then, according to most authorities, China would have had the right to regard the obligations as no longer binding. But as far as extraterritoriality was concerned, no such plea could be established. From which it follows that China's denunciations of the treaties as integral wholes, noted above, were as much at variance with the doctrines of international law as the Russian denunciation of the Treaty of Paris in 1871, and were so regarded by the Powers concerned. In every case, however, it would seem that the denunciation was a gesture to accelerate

treaty revision, and that when new treaties are concluded, the breach of international law will be condoned.

The Chinese negotiations prompt a number of reflections. In the German appeal to the doctrine of *rebus sic stantibus*, the dangers of the doctrine are very clearly evidenced. It may be invoked to cover international immorality and a cynical disregard for a state's pledged word. In the annexation of Bosnia and Herzegovina, it covered the territorial ambitions of Austria, and in the Black Sea episode of 1871 it covered a determination on the part of Russia to escape from the restrictive consequences of a recent military defeat. In the case of Turkey and China, it has proved a conveniently vague pretext on which to investigate how far European Powers were prepared to respond to the stimulus of Oriental Nationalism. In every case we find the doctrine employed as the cloak for purely political activity, and in 1871, 1881-1923, and 1926-8, the Powers adversely affected have sought to legalize a position which would otherwise have tended to bring international law into disrepute—yet they were at one in regarding the Turkish or Chinese repudiations of treaties as in conflict with international law.

In 1908, the attempt to legalize the situation was abandoned in despair, although Great Britain heroically attempted to assemble a conference to repeat the pretence of 1871,¹ and in 1914 the law was vindicated incidentally. The doctrine, therefore, has its practical origin purely in political expediency; those who have invoked it have rarely had a good case, and in some instances have had no case at all. The Covenant of the League does not offer a complete solution of the difficulty. Under these circumstances, it would seem, since the question tends to arise with increasing frequency, that if the doctrine is to be finally recognized as a rule of international law, it should be defined with greater precision, and its scope definitely limited. Failing this, there is a danger that the rule *pacta sunt servanda* will become increasingly qualified by the doctrine *rebus sic stantibus*, and the value of international undertakings will be proportionately diminished.

¹ *Cambridge History of Foreign Policy*, III, pp. 403-6.

THE MANDATE FOR PALESTINE

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SOME years ago Dr. Stoyanovsky wrote in French a thesis upon the general principles of international mandates; he has now written in English a full and illuminating study of the application of the mandate system in a particular territory, Palestine.¹ The book appears in the series of contributions to international law and diplomacy, edited by Dr. Arnold McNair, who remarks in his preface that "the mandate system represents the irruption of the idealist into one of the periodical world settlements which have in the past lain too much in the hands of so-called 'practical men'". He records his belief that in the case of the Palestine mandate, at any rate, the idealist is making good. It is the broad purpose of the book to show how the idealistic conception is embodied in the mandate, and has stood the strain of temporary circumstances.

Of all the mandated territories, Palestine, though in area among the smallest—for it is no bigger than Wales—yet commands the greatest interest of the world and the most remarkable attention from the point of view of international law. Apart from the pre-eminent historical and religious interest in the country, which for over three thousand years has been, for one people or another, a promised land, the mandate for Palestine has a distinctive character on account of the inclusion in it of the Declaration about the Jewish National Home. It is the working out of this idea by the Mandatory which particularly engages the analysis of Dr. Stoyanovsky, though he has been concerned to confine his work to the legal aspects of the various questions which are raised, and has avoided the flights of sentiment and imagination that are apt to be evoked by books on Palestine.

Lord Lugard has pointed out in his work on "The Dual Mandate in British Tropical Africa" the twofold purpose of the government of backward countries which was adopted in British Colonial practice even before the mandate system was introduced: on the one hand, the well-being and development of the inhabitants of the land; on the other hand, the benefit of all mankind.

¹ *The Mandate for Palestine*. A contribution to the theory and practice of International Mandates. By J. Stoyanovsky, LL.D., London. Longmans, Green & Co., 1928. pp. 399 (25s. net.).

The mandate for Palestine, however, has a threefold purpose. For on the one side the Mandatory exercises a trust on behalf of civilization, which is deeply concerned in the good government of a country that contains the Holy Places of three great religions; and on another side, he is responsible for placing the country under such political, administrative, and economic conditions as will secure the establishment of a Jewish National Home; while in a third aspect he is responsible that nothing shall be done which may prejudice the civil and religious rights of the existing non-Jewish communities in Palestine. The principle of the Covenant of the League of Nations, that the well-being and development of a people not yet able to stand alone is a sacred trust, is extended not only to the local inhabitants, but also to the Jewish people on the ground of the historical connexion which is recognized as existing between the Jews and Palestine.

It is one of the new developments of international law, embodied in the treaties made at the conclusion of the Great War, that it is concerned with nationalities which are not states as well as with nations which form political units. The title of the branch of law has thus become more appropriate. This development is manifested partly in the provisions for the protection of minorities in the European states and partly in the system of mandates. The connexion of international law with territorial units remains, but the law looks to the rights of different nationalities within the territory. Dr. Stoyanovsky, indeed, suggests that, in virtue of the terms of the mandate, Jews are directly dealt with by international law "across the boundaries of the various states in which they reside". That, it is submitted, is an unwarrantable deduction; for the mandate is concerned with the Jews in their relation to the particular territory of Palestine and not with their position as a nationality at large. But the mandate does recognize the historical connexion of the people with the territory as giving national rights to which the Mandatory in the first place, and the League of Nations ultimately, has pledged itself to give effect. It is the application in law of the idea that "memory also gives a right".

Another new conception in international law which is illustrated in the mandate for Palestine and is consequent upon the recognition of the Jewish nationality as a subject of the law, is that of a national home. It was contemplated in the original treaty of peace with Turkey signed by the Allied Powers that this idea should be applied to the Armenians as well as to the Jews; and at one of its first meetings the Assembly of the League of

Nations passed a resolution urging the Council of the League "to impress upon the Principal Allied Powers the necessity of making provision in the treaty for safeguarding the future of Armenia, and, in particular, of providing the Armenians with a national home entirely independent of Turkish rule". That resolution came to nought, because no fit Mandatory in the end was found. But the idea of a national home for the Jews, which had been adopted by Great Britain during the war, and subsequently confirmed by the other Allied Powers, came to fruition in the mandate. A national home connotes a territory in which a people, without receiving the rights of political sovereignty, has, nevertheless, a recognized legal position and receives the opportunity of developing its moral, social, and intellectual ideals.

The application of this idea is manifested in the mandate for Palestine by a number of clauses which are examined in detail by Dr. Stoyanovsky. They comprise the recognition of an appropriate Jewish Agency as a public body for the purpose of co-operating with the Administration of Palestine in matters which affect the establishment of the Jewish National Home, the facilitation of Jewish immigration under suitable conditions, and the encouragement in co-operation with the Jewish Agency of close settlement of Jews on the land, the inclusion in the Nationality Law of provisions framed to facilitate the acquisition of Palestinian citizenship by Jews who take up their permanent residence in Palestine, and the recognition of Hebrew as one of the three official languages of the country and of Jewish holy days as legal days of rest for the members of the Jewish community. The extent to which the policy of the Jewish National Home has determined the particular character of the mandate for Palestine is indicated by the exclusion from the application of the mandate to Transjordan of these provisions. His Majesty was appointed as the Mandatory for Palestine and Transjordan together by a single instrument. But since the historical rights of the Jewish people are recognized only in respect of the territory west of the Jordan, while the territory to the east of that river is included in the area over which Arab autonomy is to be fostered, the mandate itself provided that the Mandatory should be entitled, with the consent of the Council of the League, to postpone or withhold application in Transjordan of such provisions as he might consider inapplicable.

It was inevitable that the provision for the establishment of a Jewish National Home in Palestine should affect the functions of the Mandatory in regard to the Government of the territory.

It was on this account, presumably, that he was vested with powers of legislation and administration; and the development of self-governing institutions, which is prescribed in the same article as that dealing with the establishment of the Jewish National Home, has been, in fact, restricted, owing to the opposition of the Arab population to that policy. At the same time, as Dr. Stoyanovsky points out, the Administration of Palestine has contrived to develop local autonomy in the towns and larger villages by the constitution of elected local authorities, and has met the difficulties of mixed populations by a system of modified communal representation. In this respect the learned author makes one of his few mistakes of fact, when he suggests that under the pre-war Turkish régime only part of the members of the Municipal Councils were elected, and that only Ottoman Moslems had the right either to elect or to be elected to the Councils. The Ottoman Government, as was their way, did homage to the idea of popular representation, and, as far back as 1876, instituted a system of elected Municipal Councils for which every Ottoman subject not under any incapacity had a vote, provided he paid a fixed amount of land tax. But, as was not unusual in Ottoman institutions, practice and principle were not in accord, and, in fact, the elections were in large measure controlled. The innovation made by the Mandatory Government was to broaden the basis of the franchise, to secure appropriate representation of the different elements of the population, and to extend to the more progressive villages the system of popular local government.

While the territory of Palestine comprises two principal nationalities, there is a single Palestinian citizenship. "It would be contrary to the fundamental principles of the mandate if the national status of the local inhabitants were to be that of one section of the population, however predominant, and were to be forcibly imposed upon the others." And the conditions of obtaining that single citizenship are the same for all persons. The treaty of Sèvres, indeed, the abortive instrument in which the conditions of peace with Turkey were originally defined, did contain a clause which provided exceptionally for imposing Palestinian citizenship on foreign Jews habitually resident in Palestine. But objection was taken to that clause as derogating from the principle that a person should not be deprived of his nationality against his will; and when the matter was further considered in the Treaty of Lausanne, the clause disappeared. Another curious anomaly of nationality has, however, arisen, which was not known to the

author. British subjects who acquire Palestinian citizenship by naturalization do not thereby lose British nationality, because, it is held, they do not entertain any fresh allegiance, and for this purpose Palestine cannot be regarded as a foreign state in relation to the Mandatory.

The theoretical question of sovereignty as between the Mandatory and the mandated territory has so far been evaded, and need not, perhaps, be answered. But in a case where the Mandatory has full power of legislation and administration, as he has in Palestine, he exercises certain elements of sovereignty, and the citizen of the territory subject to the mandate owes a degree of subjection to him. The national status of such a citizen is, from one angle, separate from the nationality of the full subject of the Mandatory Power, but, from another angle, may be combined with it. Thus the Council of the League of Nations has ruled that the inhabitants of a territory governed under a so-called "C" mandate, where likewise the Mandatory has full powers of legislation and administration, may become naturalized subjects of the Mandatory.

Similarly the foreign relations of the mandated territory while in theory distinct from those of the Mandatory, yet, being controlled by the Mandatory, must become in practice associated with it. Dr. Stoyanovsky notes, however, a difference in the application of treaties to a colony on the one hand and to a mandated territory on the other. While a special provision is necessary in order to exclude a colony from the scope of a treaty signed by the Mother Country, a special provision is required for the purpose of including a mandated territory in the benefit of a treaty signed by the Mandatory.

There is scarcely any clause of the Palestine mandate which is without its legal and practical problems. But nearly all of them have received definite and actual application. The articles concerning the Holy Places, which were inserted in order to protect the essential religious interests of the different communities, and provided for the appointment of a special commission to study and determine the various rights, have, indeed, so far proved impossible of fulfilment, because the Latin Powers have been unable to agree on the composition of the commission. Dr. Stoyanovsky, writing in the summer of 1928, was too optimistic when he suggested that no serious difficulties have arisen from the failure to appoint the commission, and that the Government of Palestine has maintained the *status quo* without trouble. The question of

Jewish rights of worship at the western wall of the ancient Temple area conflicting with Moslem rights of ownership leaped into prominence last autumn, and inflamed the communities. And neither the Mandatory nor the League of Nations has yet found a way of conciliation.

Dr. Stoyanovsky examines thoroughly the means laid down for the enforcement of the terms of the mandate. The observance of the trust is secured in part by the moral obligation of the trustee; but also by the constant supervision of the League of Nations. The control of the League is expressed in three forms:

- (a) the definition of the terms of the mandate and their modification;
- (b) the interpretation of the terms of the mandate;
- (c) the examination of Annual Reports of the Mandatory and petitions from the mandated territory.

And the instruments of that control are likewise three. The Council of the League has defined the terms of each mandate and may be called upon to modify them; the Permanent Court of International Justice may be called on to interpret those terms, in case of any dispute between a Member of the League and the Mandatory; and the Permanent Mandates Commission considers once a year the Report of His Majesty's Government on the mandated territory, and, more frequently, petitions of any person or body in the mandated territory. Palestine has enjoyed to the full the exercise of these powers of control. The terms of its mandate were only settled after protracted discussion in the Council, so that the mandate itself came into legal operation more than three years after its principles had been adopted by the Government. The Permanent Court of International Justice has been required three times—out of the dozen cases where it has acted in its regular judicial capacity—to pronounce on the true meaning of the articles dealing with the development of the natural resources of Palestine and the grant of concessions in the territory. Lastly, the Permanent Mandates Commission has been occupied each year since 1924, in no perfunctory way, with the examination of contending applications of Jews and Arabs, and with an endeavour to help the Mandatory to find a harmony between the two interests.

It is noteworthy, also, that in connexion with Palestine the Mandates Commission were asked to extend their scrutiny in two ways; first by sending out a delegation to the mandated territory to study conditions on the spot, and secondly by hearing petitioners

from the country in person. The Mandatory Powers, when consulted, expressed their objection to any extension on these lines of the functions of the Commission, and the Council of the League of Nations were of the same mind. It would have involved an interference with the work of administration which was calculated to embarrass the local government, and the members of the Commission themselves appreciated the danger. They have adhered to the examination of the written pleadings, save that a representative of the Mandatory Power is regularly present at the meetings of the Commission to furnish explanations on any question. The Permanent Mandates Commission, it has been well said, combines the thoroughness of a Board of Directors with the sense of justice of a Supreme Court. But it is not a judicial body and does not follow judicial procedure.

Of Palestine it may be said that, if the mandate system had not been evolved for other purposes, it would have had to be created for the government of the Holy Land. For Palestine, by its history, its geography, its population, and its destiny, is an international country, and its well-being and development form, without express declaration, a sacred trust of civilization. At one period in the inter-allied bargaining of the war years it seemed to be marked out for an international government, a form of administration which has scarcely ever prospered. It was saved that trial by the invention of statesmanship which happily combines the protecting authority of a single state with the supervision of an international body. It has been said of the introduction of the mandate system to the territories detached from Turkey that the conditions in those areas precluded immediate independence; principle precluded annexation; experience precluded internationalization. The application of the mandate to Palestine indicates the benefit which may be obtained through the administration of a country with complex national problems by one guardian Power subject to a trust to protect both national and international interests, and subject to the sympathetic scrutiny of a permanent international council which has as its function to assist and advise the Mandatory, while it is the function of the Mandatory itself to direct the local Government.

THE CHICAGO DIVERSION¹

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THE grave international problem created by the diversion of the waters of Lake Michigan at Chicago is a by-product of a geographical situation which is probably unique in the world. In all places the head waters of great river systems approach one another closely at the watershed, but as a rule they begin with tiny streams of no practical importance or utility. Again, these watershed areas are usually in mountain country remote from great centres of population. For both these reasons there is normally no practical purpose to be served by any interference with the natural course of the streams, and therefore there is no conflict of interests calling for legal or political solution.

But at the point where the watershed between the St. Lawrence and Mississippi basins comes close to the south-western corner of Lake Michigan we have a situation which is peculiar in two respects. The country forms part of the great central plain of North America, and the actual watershed is formed by a very low range of hills called the Valparaiso moraine, which at its lowest point is only ten feet above the level of Lake Michigan. On the other side of the low ridge, within a few hours' walk of Chicago, we find the Desplaines River, which presently joins the sluggish stream of the Illinois and thus creates a navigable waterway to the Mississippi and the Gulf of Mexico. In no other part of the world do the navigable waters of two great river systems approach so close to the watershed and in no other place does the connexion between them present such a simple problem for the engineer.

The second peculiarity is that at this critical point there has grown up with mushroom rapidity one of the greatest cities of the world. We have all heard much of Chicago in recent years, but chiefly in connexion with its slaughter-houses, its murders, and its mayor, and these are what in our profession we call matters of domestic jurisdiction. At first we may be inclined to think that drains fall under the same head, yet for the international lawyer

¹ I must acknowledge my deep indebtedness to Dr. O. D. Skelton, Under-Secretary of State for Canada, who has been most kind in supplying me with documents, many of which are not easily available in England. This does not involve him in any responsibility for my opinions.

it is in the drains that his problem begins. The fundamental fact is that Chicago has grown too fast for its drains. Modern sanitary engineering undoubtedly finds it possible to deal even with the sewage of a vast city situated in a flat plain, but the solution of the problem by highly technical methods is neither easy nor cheap. It is much simpler just to pour the sewage into a convenient lake or river, and so they began by pouring it into Lake Michigan. But the waters of the lake were also needed for drinking purposes, and this confusion of functions naturally produced undesirable results. As time went on it proved more and more difficult to push the intake of the water supply out so far as to be beyond the reach of contamination from the sewers, and the health of the population suffered grievously.

Two possible solutions remained. One was to erect a modern system of filtration and disposal works. The other was to divert the flow of sewage from east to west. The second idea had some history behind it. The early French missionary explorers, little interested in international law and less in drains, had foreseen the possibility of linking the two great river systems by piercing the low divide, and in 1848 a small canal had been actually constructed. It was fed by primitive methods from the neighbouring streams and caused no appreciable diversion of water.

The temptation proved irresistible. In 1889 the Illinois legislature created a corporation called the Sanitary District of Chicago and empowered it to build a drainage canal leading from Lake Michigan to the Desplaines River. The original works were completed in 1900 and frequently extended. Their effect was to reverse the flow of the small streams debouching into Lake Michigan and also to divert a large and increasing body of water from the lake itself into the Mississippi basin. In their original conception these canals were for sanitary purposes only, but in 1907 the system was further developed to provide hydro-electric power, and the ambitions of Chicago began to play with the idea of a great navigable waterway which would make the city a port in direct communication with the Gulf of Mexico. In 1925 and 1926 an active campaign was carried on to obtain Congressional approval for a nine-foot waterway, and a bill was actually passed in January 1927, but with the important proviso "that nothing in this Act shall be construed as authorising any diversion of water from Lake Michigan"—a proviso which nullified the value of the concession.

Although it is obvious that the federal system of the United

States cannot be pleaded in abatement of its international liabilities, perhaps it may be convenient to say a word here about the direct participation of Washington in the activities of Chicago. In 1901 a permit from the Secretary of War authorized the Sanitary District to divert 4,167 cubic feet per second from Lake Michigan, and in 1907 an application to increase the amount was refused by Mr. Taft on the ground that it might lead to international complications. Another application for a permit to withdraw 10,000 c.s.f. was refused by Mr. Stimson, the present Secretary of State, in 1913.¹ Chicago failed to observe the limits imposed, and in 1913 the Federal Government moved for an injunction. After taking the case under advisement for six years, Judge Landis in 1920 granted an injunction in the Federal District Court at Chicago, and in January 1925 his decision was affirmed by the Supreme Court in a judgment which drew attention, among other things, to the treaty obligations of the United States.² Nevertheless, in March the Secretary of War abandoned the fruits of his victory and granted a new permit for the withdrawal of 8,500 c.s.f., subject to certain conditions, of which the most important were that there should be "no unreasonable interference with navigation" and that the city should undertake the construction of proper sewage disposal works. This permit was exclusive of the amount required for ordinary domestic purposes, and the State Department explained to the Canadian Government that in March 1925 the average withdrawal amounted to 9,700 c.s.f. So long ago as 1909 the actual amount taken was admitted by the Secretary of State to be 10,000 c.s.f.,³ and it is certainly not less than that to-day.

These figures by themselves will convey little to most of us, but the practical consequences are serious. Technical calculations show that the authorized reduction of 8,500 c.s.f. reduces the water-level in the port of Montreal by 4.44 inches,⁴ and the actual reduction is probably nearly six. In the case of a big ship every inch is equivalent to about seventy tons of cargo, and the large liners that go to Montreal have only a few inches of water under their keels. It should be remembered that the deep waterway from the ocean to Montreal has been developed entirely by Canadian energy and money, although the use of it has by treaty been made

¹ See below, pp. 152, 153.

² *Sanitary District of Chicago v. United States*. 266 U.S. 405. The delay in the court below was sharply censured.

³ See p. 148, below.

⁴ *U.S. Senate Document* No. 183 of 1927, p. 51. On the Great Lakes and in the river above Montreal the reduction is even more serious.

common to the traffic of both nations. The cost of restoring the depths by dredging is estimated at \$4,608,000.¹

The loss can also be expressed in terms of the hydro-electric power which is capable of development on the St. Lawrence between Prescott and Montreal. According to the calculations of the Joint Board of Engineers which has investigated the technical aspects of the St. Lawrence waterway scheme, the loss would amount to 70,125 horse-power in the international section of the river, and 90,950 in the Canadian section.² These figures are based on its "authorized" withdrawal of 8,500 c.s.f., and the actual loss is proportionately greater.

We may sum up this statement of the facts by saying that the existing diversion has already worked grave injury to Canadian interests, and that the possibilities of future injury are greater still if Congress should ever give its consent to the proposed ship canal from Chicago to the Mississippi. That brings us to the issues of law involved. Is it a case of *damnum sine injuria*, or is it an example of an international wrong engaging the liability of the delinquent state? In order to answer this question we must consider both treaty stipulations and general rules of law.

The long controversy between Great Britain and the United States over the navigation of the St. Lawrence was closed by the Treaty of Washington in 1871, when Great Britain conceded the American claim to equality of treatment on the St. Lawrence in return for similar privileges upon the Porcupine, Yukon, and Stikine Rivers, as well as upon Lake Michigan. This treaty does not deal specifically with the problem of diversion, but it has some bearing on the broader aspects of the question. Since the early years of her independence the United States had strenuously contended for the principle of equal rights upon international rivers, claiming that an upper riparian state had a natural right of passage through the national waters of the lower. In the treaty each side reserved its own point of view in principle, but the American claim was conceded in the particular instance. Perhaps we cannot always demand consistency in international argument, but it may be pointed out that a state which claims equal rights of navigation in the lower waterway can scarcely claim at the same time the right to injure or to destroy it by unilateral action.

More directly bearing upon the controversy is the Boundary Waters Treaty of 1909. The main purpose of this agreement was the establishment of an "International Joint Commission"

¹ *Ibid.*, pp. 52, 57.

² *U.S. Senate Document*, No. 183 of 1927, p. 57.

charged with the duty of advising and reporting upon all questions arising out of the use of boundary waters. These reports have no arbitral value, and each Government retains its liberty of action. Much useful work has been done by the Commission in the last twenty years, but neither Government has as yet asked for a report upon the problem created by the Chicago diversion.

Some of the provisions of the treaty may be summarized. The preliminary article defines boundary waters as those "along which the international boundary . . . passes, . . . but not including tributary waters", so that Lake Michigan does not fall within the definition. Article 1 provides for freedom of navigation in the usual form, and Article 2 reserves to each party the exclusive jurisdiction over tributary waters in its own territory, but with the important proviso that "neither of the High Contracting Parties intends by the foregoing provision to surrender any right which it may have to object to any interference with or diversions of waters on the other side of the boundary the effect of which would be productive of material injury to the navigation interests on its own side of the boundary". None of the other articles bears directly upon the present question, since they all deal with the construction of works in "boundary waters", as previously defined, except for a provision (Article 4) that "waters flowing across the boundary shall not be polluted".

So far as the Chicago diversion is concerned, the effect of the treaty is clearly to preserve the existing rights of the parties under the general rules of international law. On the American side it seems to have been thought that this constituted an implied sanction of the diversion. In explaining the treaty to the Foreign Relations Committee of the Senate, Mr. Root said

"I have very carefully guarded the terms of this treaty in order not to include Lake Michigan and in order not to involve Senator Cullom's constituents in the drainage canal in the treaty in any way."

Again, after referring to the provision in Article 5 which conceded to Canada the larger share of power at Niagara, he went on to say:

"Then there is this further fact why we could not object to this 36,000 provision on the Canadian side (i. e. at Niagara). We are now taking 10,000 cubic feet a second out of Lake Michigan at Chicago, and I refused to permit them to say anything in the treaty about it. . . . They consented to leave out of the treaty any reference to the drainage canal, and we are now taking 10,000 cubic feet per second for the drainage canal which really comes out of the lake system."¹

¹ These passages were cited by Mr. Hughes in his report to the Supreme Court in 1927; see p. 153, below.

This suggestion necessitates a passing reference to Article 5, which permits Canada to use 36,000 c.s.f. and the United States 20,000 c.s.f. for power generation at Niagara. The purpose of this limitation is stated to be "so that the level of Lake Erie and the flow of the stream (i.e. the beauty of the Falls) shall not be appreciably affected". By far the greater volume of water flows on the Canadian side, and the article goes on to say that the parties desire to protect the existing investments in power plants. Since all the water taken at Niagara is returned to the river, the diversion does not affect navigation lower down, and there is not a word in the treaty to indicate that the apportionment was to be regarded in any way as a compensation for the water taken out at Chicago.¹

We may now pass to consider the question under the general rules of international law. The standard authors, all of whom discuss at length the question of navigation rights on international rivers, scarcely seem to have realized the importance of the problem of economic exploitation, but a short paragraph in Oppenheim (or rather Dr. McNair)² indicates that the writer would have supported the Canadian contention in the present controversy. Fauchille contents himself with recording a number of treaty stipulations from 1843 to 1923, but does not give us his own views upon the general problem.³ Taken as a whole, these treaties proceed upon the principle that works executed in the territory of A require the consent of B if they injuriously affect his interests. In general they indicate a tendency to incorporate this principle in the conventional law of nations, particularly as one of them is a general international agreement.⁴

Of judicial decisions the one most directly in point is a judgment rendered by the German Staatsgerichtshof on June 18, 1927, in a controversy between Württemberg and Baden concerning the use of the upper waters of the Danube.⁵ Between the towns of Hüfingen in Baden and Fridengen in Württemberg the bed of the river is porous, with the result that a large quantity of water

¹ The contention that the treaty authorized the diversion was denied by counsel for the Federal Government in argument before the Supreme Court; 266 U.S. 420.

² *International Law*, 4th ed. (McNair), Vol. I, p. 381.

³ *Traité de Droit International Public*, Sec. 525²². In discussing national rivers (sec. 435) Fauchille maintains that the right of industrial exploitation should be subordinated to the common right of navigation where it exists. Presumably this theory would apply *a fortiori* to international rivers.

⁴ The Geneva Hydro-Electric Convention of 1923; *League of Nations Treaty Series*, Vol. XXXVI, p. 76.

⁵ *Entscheidungen des Reichsgerichts in Zivilsachen*, Vol. CXVI, App.

percolates away underground and ultimately emerges to form the source of the little river Aach, which flows into Lake Constance. By reason of this phenomenon, known as the *Donauversinkung*, the water of the Aach is rich in mineral solutions and is of special value for industrial purposes. Of this Baden gets the benefit. On the other hand, Württemberg suffers by the loss of water, the river being frequently dried up altogether for considerable periods. The dispute arose out of the fact that each state had constructed works designed to protect its own interests, Baden seeking to increase and Württemberg to diminish the percolation of the river. Each party now sought an injunction to restrain the activities of the other.

Since the constitutional and municipal law of Germany afforded no solution, the Court was compelled to rest its judgment upon international law. It was pointed out that modern international law restricts the application of the doctrine of territorial sovereignty by the principle *sic utere tuo ut alienum non laedas*. Broadly speaking, neither state is entitled to make artificial alterations in the flow of the river which cause injury to the other. The application of this principle must be governed by the circumstances of each particular case, and the conflicting interests must be weighed equitably against each other. One must consider, not only the absolute injury caused to the neighbouring state, but also the relation of the advantage gained by one to the injury caused to the other.

In the result Baden was ordered to refrain from causing such increase in the percolation as was due (i) to certain works at Immendingen, and (ii) to the accumulation of sand and flint in the bed of the river along the shore near Möhringen, but it was held that she was not bound to undertake responsibility for the permanent improvement of the river bed. Württemberg was similarly ordered to refrain from obstructing the percolation by certain works which she had constructed.

The English lawyer will notice a certain resemblance between this judgment and the decision of the Privy Council in *Stollmeyer v. Trinidad Lake Petroleum Co.*¹ In each case the dominant principle is the right of each riparian owner to enjoy the stream in its natural form, but this principle is qualified by applying the doctrine of practical convenience and the equitable apportionment of benefits.

To the same effect is the opinion of the United States Supreme

¹ [1918] A.C. 485.

Court in the case of *Kansas v. Colorado*,¹ where Kansas complained that Colorado was using up the waters of the Arkansas River for irrigation purposes. Kansas put her claim upon the basis of strict riparian rights under the English common law, an argument which, if conceded in full, would in effect have given her the right to say that a large part of Colorado should be a permanent desert. Colorado claimed that the principle of territorial sovereignty gave her the right to do as she pleased with all water on her own territory, and this claim, had it succeeded, would have similarly given her the right to dry up the whole valley of the river in the lower state.

In the result, after an elaborate review of a great mass of evidence, the bill was dismissed upon the broad ground that the facts did not point to an unreasonable or inequitable division of the general benefits of the river. The reasons are summarized in a few sentences at the end of a lengthy judgment:²

"We are of the opinion that the appropriation of the waters of the Arkansas by Colorado, for purposes of irrigation, has diminished the flow of water into the State of Kansas; that the result of that appropriation has been the reclamation of large areas in Colorado, transforming thousands of acres into fertile fields and rendering possible their occupation and cultivation, when otherwise they would have continued barren and unoccupied; that while the influence of such diminution has been of perceptible injury to portions of the Arkansas valley in Kansas, particularly those portions closest to the Colorado line, yet to the great body of the valley it has worked little, if any, detriment, and regarding the interests of both States and the right of each to receive benefit through irrigation and in any other manner from the waters of this stream, we are not satisfied that Kansas has made out a case entitling it to a decree. At the same time it is obvious that if the depletion of the waters of the river by Colorado continues to increase there will come a time when Kansas may justly say that there is no longer an equitable division of benefits, and may rightfully call for relief against the action of Colorado. . . . The decree will dismiss the bill of the State of Kansas as against all the defendants, without prejudice to the right of the plaintiff to institute new proceedings whenever it shall appear that through a material increase in the depletion of the waters of the Arkansas by Colorado, its corporations or citizens, the substantial interests of Kansas are being injured to the extent of destroying the equitable apportionment of benefits between the two States resulting from the flow of the river. Each party will pay its own costs."

The Chicago drainage canal had itself come before the Supreme Court a year earlier in the case of *Missouri v. Illinois*,³ in which Missouri claimed that the Mississippi River was being seriously polluted by the discharge of sewage from Chicago. Here, again, the bill was dismissed upon the facts, the evidence showing that

¹ [1902] 185 U.S. 125, and [1907] 205 U.S. 46.

² 206 U.S. 117.

³ [1906] 202 U.S. 598.

the pollution was more than counterbalanced by the introduction of a large volume of pure water from Lake Michigan. But the Court stated clearly that it would have been prepared to grant an injunction if the evidence had disclosed a case of nuisance, and overruled a demurrer by which the defendant state alleged that the case presented no justiciable controversy.¹

Diplomatic history throws but little light upon the problem. Its emergence into the field of practical politics is comparatively modern, and most of the possible cases of conflict appear to have been foreseen and provided for by treaty. But a passing reference should be made to the prolonged controversy between the United States and Mexico concerning the use of the Rio Grande for irrigation purposes,² which was settled in 1906 by a treaty providing for apportionment of the water according to a detailed scheme, with a proviso that no principle of law was deemed to be thereby admitted. The case is of interest chiefly by reason of the official opinion of the United States Attorney-General, Mr. Harmon, that the doctrine of sovereignty involved the absolute right of a state to do as it pleased with the waters in its own territory. This opinion was given in 1895, and the dispute appears to be the first one in which the issue was clearly raised as a question of international law. Such an extreme assertion of sovereign rights would certainly not command the support of competent authority at the present day.

The correspondence between Canada and the United States from 1912 to 1927 has now been published as a Canadian Blue Book, No. 227 of 1928. It contains no discussion of the legal question, except for the repeated assertions of the Canadian Government that the diversion is contrary to international law. In a note dated July 26, 1926, Mr. Kellogg says that he is "not prepared to admit" the legal contention put forward by Canada, but no further indication is given of the American attitude towards this problem. In the last note of the series (Oct. 17, 1927) he again refuses to discuss the legal issue. Perhaps the most interesting item in this correspondence is the reasoned opinion of the Secretary of War, Mr. Stimson, in refusing the Chicago application for an enlarged permit in 1913 (pp. 7-13). The final paragraph is short enough to be quoted:

¹ 200 U.S. 496.

² Moore's *Digest*, Vol. I, p. 653; Hyde, *International Law*, Vol. I, p. 313. The injunction granted by the Supreme Court in 1899 was based wholly on reasons of municipal law; *United States v. Rio Grande Dam and Irrigation Co.* 174 U.S. 690.

"In short, after a careful consideration of all the facts presented, I have reached the following conclusions:

"First, that the diversion of 10,000 cubic feet per second from Lake Michigan, as applied for in this petition, would substantially interfere with the navigable capacity of the navigable waters in the Great Lakes and their connecting rivers.

"Second, that that being so, it would not be appropriate for me without express congressional sanction to permit such a diversion, however clearly demanded by the local interests of the sanitation of Chicago.

"Third, that on the facts here presented no such case of local permanent necessity is made evident.

"Fourth, that the provisions of the Canadian treaty for a settlement by joint commission of 'Questions or matters of difference' between the United States and Canada offer a further reason why no administrative officer should authorize a further diversion of water, manifestly so injurious to Canada, against Canadian protest."

It is not easy to understand why any of these reasons were any less valid in 1925, when Mr. Stimson's successor, Mr. Weeks, granted his permit for an increased diversion immediately after obtaining an injunction from the Supreme Court to prevent it.

Perhaps it is necessary to add at this point that the conflict of interests presented by this controversy does not entirely follow international lines. The interests of New York and several other eastern states are identical with those of Canada, and these states have consistently opposed the policy of Chicago. At the present moment we are awaiting the judgment of the Supreme Court in a complicated case in which six states appear as plaintiffs and seven as defendants. In October 1927 the Court referred the issues of fact and law involved for report by Mr. Hughes as "special master", and he has since reported to the effect that the action of the Secretary of War in granting the permit is within his constitutional powers. No question of international law is involved in this opinion, and no action has as yet been taken upon it by the Supreme Court.¹

Upon the whole problem authority is not very plentiful, but its tendency is unmistakable. Substantially it consists of the treaty provisions, now fairly numerous, and the German and American decisions cited above. The analogy of private law, in so far as it is relevant, points in the same direction. Practical convenience and common sense unite with authority to condemn the doctrine laid down by Mr. Harmon in 1895, that territorial sovereignty permits a state to do as it likes with waters in its own territory, irrespective of any injury it may cause to its neighbours. On the other hand, it is clear that international practice will not

¹ See Garner in *American Journal of International Law* (1928), Vol. XXII, p. 837.

support the extreme assertion of riparian rights that is possible under the strict rules of private law. The Roman and English rules upon the subject were developed long before the scientific exploitation of water systems could be foreseen, and even within the limits of municipal law their strict application can work serious injustice.¹ In practice it has been necessary to override them by public rights of expropriation in order to provide for such communal necessities as water supply and drainage. The same principle of the paramount right of the larger community holds good also in international law, but international agreement must take the place of the superior common authority which is lacking in international relations. Any particular river system must be viewed as a whole and its benefits distributed in equitable proportions among the riparian states. This is the principle underlying the German and American decisions, and it is also the dominant note of the treaty provisions. It means in effect that no state is bound to submit to injury inflicted by the unilateral action of another, while on the other hand a state would be guilty of an unfriendly act in refusing its assent to a reasonable scheme of common exploitation. The circumstances of every individual case will vary greatly, and probably it is not possible for international law to lay down rules in any more precise detail.

How can we apply these principles to the Chicago case? Obviously Canada cannot claim the right to cause an epidemic in the city by the immediate closing down of the existing drainage system, nor has any such demand been made by the Canadian Government. On the other hand, it is clear that the United States cannot plead necessity in defence of the action taken by Chicago, a plea which the Federal Government itself overruled in 1913. If Chicago has preferred to use Lake Michigan as a flushing tank rather than instal a modern system of sewage disposal, it has done so merely to save the pockets of its taxpayers, and this motive can certainly not justify the infliction of a permanent injury upon navigation and other interests in Canada. Still less can the plea of necessity excuse the diversion of the waters of the St. Lawrence system to another river basin for the purposes of hydro-electric power and navigation.

Assuming the fact of material injury in the present or in the future it seems beyond question that Canada has suffered an undoubted wrong in that the diversion has been carried out at every stage without any adequate attempt to consult her or to

¹ See *Bradford Corporation v. Pickles* [1895] A.C. 587.

consider her interests. So far as the Chicago authorities are concerned, they have entirely failed to observe the principle of the paramount interest of the whole community—what the Supreme Court calls “the equitable apportionment of benefits”. At p. 16 of the published correspondence we find the following extract from a report by the President of the Sanitary District:—“I am of the opinion that the presumption that our water supply is to be limited to 10,000 c.s.f. . . . is gratuitous and mischievous and should not be voiced by the officials of this District. I believe that we should have the volume requisite to our needs as they appear and are justified.” The principle of equitable apportionment contains the essence of the international law upon the matter, and its application in particular cases can only be determined by voluntary agreement.

Even the Federal Government must share the responsibility for neglecting to obtain the consent of Canada by the usual methods. In 1912 the Canadian Government was informed of the intention of the Secretary of War to hear arguments upon the Chicago application and consented, though without waiving her right to diplomatic remonstrance, to be represented at the hearing. Although on this occasion the permit was refused, we must regard it as an error of judgment that the Canadian Government consented to appear in the rôle of suppliant before an administrative officer of the United States. When served with notice of the renewed application in 1925 the Canadian Government took the more correct course of ignoring the proceedings in the Secretary's office. At no stage did the United States Government attempt to obtain the diplomatic consent of Canada to the proposed diversion, and its responsibility is enhanced by the fact that the Secretary of War proceeded to sanction an increased diversion immediately after obtaining a decision that it was illegal under his own municipal law.

To show how the matter ought to have been handled we may refer to the Lake of the Woods Treaty of 1925. This treaty was based upon a report of the International Joint Commission, and it sets up an international board of engineers charged with the duty of regulating the levels of the lake in the common interest of both countries. By Article 11 it is provided that “No diversion shall henceforth be made of any waters from the Lake of the Woods watershed to any other watershed except by authority of the United States or of the Dominion of Canada within their respective territories and with the approval of the International Joint Commission”. Had the Chicago problem been approached

in this spirit at the outset the present trouble need never have arisen.

In the later notes of the published correspondence Mr. Kellogg holds out the hope that the diversion may be reduced to the original figure of 4,167 c.s.f. by 1935, if Chicago fully complies with the conditions imposed by the permit of 1925, and he expresses his confidence that the city authorities are sincere in their intention to instal a modern system of sewage disposal. Those who have studied the relations between the Sanitary District and the Federal Government may be pardoned if they are slow to share this optimism, but in any case it does not affect the law of the matter. Even if the injury ceases in 1935, compensation will still be due for the damage inflicted in the intervening years.

From the Canadian point of view the undisputed facts present a clear case of an international wrong involving the legal responsibility of the United States. If the present article appears one-sided I can only plead that I have not had the advantage of studying the opposing case. The Canadian Government has repeatedly and clearly expressed its views of the law, but Mr. Kellogg has twice declined to state the legal reasons which can be advanced to justify the action of the United States. It is to be hoped that his successor may be less reticent.

Postscript (May 16, 1929).

Since this article was written I learn from an article by Mr. J. Q. Dealey in the *American Journal of International Law* (April 1929, p. 310) that the Supreme Court has now granted the injunction sought for in the inter-state suit to which I referred, but has given time for compliance with its decree. The report of the case is not yet available in England, but the decision appears to rest mainly upon grounds of municipal law. Mr. Dealey adds:

"The court also held, without devoting much argument to it, that a diversion of water in one state, which causes a lowering of water-levels in other states and therefore does substantial injury to their interests, is illegal unless it be for the purpose of maintaining or improving navigation. In so far as the legal principles governing the states of the American Union may be applied internationally, this does much to sustain the argument of Canada, as this will be described in the following pages of this article, that the Chicago diversion was begun and is being carried on in violation of Canadian rights under international law."

Mr. Dealey's article is mainly concerned with the history of the negotiations between the various parties concerned, but I gather that he endorses the legal doctrine laid down by Mr. Harmon in

the Rio Grande case in 1895. He also maintains that the apportionment at Niagara should be regarded as a *quid pro quo* for the Chicago diversion. I cannot share his view on either point, but it is possible that his arguments may be adopted by the United States Government, should the occasion arise.

The recent Anglo-Egyptian agreement upon the control of the waters of the Nile affords yet another example of a treaty which embodies the principle of international law for which I have contended.

BRITISH POLICY AND THE REGULATION OF EUROPEAN RIVERS OF INTERNATIONAL CONCERN

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No truly international river flows through British territory in Europe: no river that separates or traverses two or more states. Yet in the past few international conferences that have considered the control of such rivers have been free from British influence, direct or indirect, and at present a British representative will be found on each of the commissions that regulate the chief international rivers of the Continent. But it is not so much the extent of her control as the character and success of her policy that is of interest. The continuity of this policy has been interrupted by one great break, the year 1814-15. The programme followed on one side of this dividing line is in direct contrast with that on the other side. In the first of these two periods, Great Britain appeared as the consistent champion of restriction of navigation. How directly opposite has been the character of her policy during the second period is best shown by the fact that in practically every case the origin of those ideas about the control and use of international rivers which are now regarded as most fundamental may be traced back to the work of some British statesman during the nineteenth or twentieth century. In this paper it is proposed to deal with two rivers only, one in western Europe, the Scheldt, the other in eastern Europe, the Danube.

I

The Scheldt.

In the earlier of these two periods there were comparatively few rivers of international concern, and of these the Scheldt was of chief moment from the British point of view. The prevailing theory of the time, even in its most liberal expression, regarded an international river as open to the common use of riparian states only, with the result that non-riparians were prevented from taking any serious interest in such a river as an economic unit. It was a combination of circumstances of a political and defensive nature that directed British attention particularly to the Scheldt.

On the side of defence the first concern was naturally for security, and in this connexion the Scheldt was well worth watching. The strategic availability of the Scheldt as a base of attack on the east coast of England had been demonstrated at an early date, for it was there, in a channel now silted up, but in the fourteenth century a good roadstead, that the French fleet was collected for a descent on England in 1330. The proposed attack never took place, for Edward III promptly crossed the channel and destroyed the French fleet in the Battle of Sluys, but the event gives reason to British interest in the Scheldt during the next centuries. It is even possible that for a while Great Britain contemplated actual possession of territory along the river as the best means of insurance against attack. Certainly her activities in the Netherlands in the wars which preceded the Thirty Years' War were not regarded as entirely disinterested by a contemporary, Renon de France, who indicates the Isle of Walcheren in particular as the probable objective.¹ The Scheldt continued to be a possible danger for several centuries, especially when Napoleon was in control, and not until 1815 was Great Britain relieved of apprehension in this respect.

Politically, Great Britain's position was difficult, and became increasingly so during the latter part of the period. With France definitely hostile, and Austria the ally of France, Britain's choice in friends narrowed itself to Prussia and the United Provinces. But lack of any basis or tradition of friendship with regard to Prussia automatically took away any real choice.² Out of this situation developed the British policy of attempting to cultivate and hold the regard of the United Provinces. An alliance between the two Powers was of long standing. Even before the Treaties of Westphalia, the Infanta Isabelle writing to Philip IV speaks of this alliance as "trop ancienne pour que l'un puisse lâcher l'autre".³ This description is slightly flattering considering that the alliance at times degenerated into actual war. Throughout, Great Britain was the more ardent of the two allies, for her need for a check to the power of France and Spain and her desire to have the Scheldt in safe hands gave her motive.

These considerations of a political and defensive nature

¹ Mémoires de Renon de France, published under the title of *Histoire des Troubles des Pays-Bas*, by Charles Picot, p. 102.

² *Cambridge History of British Foreign Policy*, Vol. I, p. 159.

³ Letter from Bruxelles, April 17, 1627: *Correspondance de la Cour d'Espagne sur les Affaires des Pays-Bas au 17e Siècle*, edited by H. Louchay and J. Cuvelier, Vol. II, p. 325.

explain more than Great Britain's predominant interest in the Scheldt. They indicate also the main lines which her policy was to follow down to 1815: a policy which led her, time and again, to deny the use of an international river even to the co-riparian states.

The first instance of such action occurred soon after the Treaties of Westphalia. By Article 14¹ of the separate Treaty of Münster between Spain and the Netherlands, Spain recognized the right of the latter to close the river Scheldt against the Belgian Provinces and the world at large.² Great Britain had no direct share in the negotiations which resulted in this treaty, for she was not a party to the Thirty Years' War. But by subsequent treaties concluded at intervals for two centuries, she gave her sanction thereto by guaranteeing to the United Provinces the enjoyment of all their rights and immunities.

This action was taken despite the fact that there existed a considerable trade between English and Belgian merchants, especially in woollens and fine cloth. There is ample evidence of the importance of this trade in the literature of the times. Early in the seventeenth century a pamphlet appeared by a writer signing himself simply "un gentilhomme de la Chambre du Roi", who strongly opposed the suggested policy of prohibiting the importation of English cloth into Flanders. After enumerating several objections in the line of practical difficulties of application, he suggests that the more profitable policy would be to impose a moderate duty on English goods, for then "l'étaple du trafic d'Angleterre se remettant, Anvers se trouvera mélieure et enrichye de plusieurs tonneaux d'or par an, par les accoustrages et teintures des draps seulement".³ This trade existed, however, in spite of the closing of the river, and even had Great Britain opposed this restriction, British merchants would not have received any very direct benefit. The river, if declared open, would not have received British ships, but only those of the riparian states. On the other hand, to support Holland in closing the Scheldt was expedient for many reasons. It favoured a desirable and difficult ally; and at the

¹ Dumont, *Corps Diplomatique*, Vol. VII, Part I, p. 349.

² This concession on Spain's part was agreed to in order to induce the Dutch to break their treaty alliance with France, by which both Powers had agreed that peace should be made jointly or not at all. C. G. Koch, *Histoire Abrégée des Traités de Paix, &c.*, Augmenté et continué par F. Schoell, Vol. I, pp. 69-85. Bougeant, *Histoire de Traité de Westphalie*, Vol. V, pp. 333-7, gives a short account.

³ "Discours sur le Redressement de la draperie": reprinted in *Correspondance de la Cour d'Espagne*, *op. cit.*, Vol. I, pp. 587-8.

same time it assured the friendly use of a possible instrument of great harm.

British diplomacy received a severe test in 1785 when the Emperor Joseph II, becoming concerned for his Belgian Provinces, demanded that the Scheldt should be opened, and that certain territorial adjustments should be made in his favour. England, supporting Holland, opposed the demand and hoped for trouble. France, Holland, and Austria had been distinctly drawing together of late, and there was reason to believe that this demand might create a break in the relations of these three Powers. But such was not the case. France successfully acted as mediator, paying a large sum to Austria in return for the withdrawal of her claim to navigate the Scheldt.¹ Three years later Great Britain and Holland concluded a new alliance (1788) by which they again promised mutual assistance in case of war and guaranteed each other the possession of existing territory and rights.²

Scarcely had this crisis passed when the French revolution began. British policy at first was one of watchful non-interference. France should be left to work out her own internal problems without intervention, unless Holland were actually attacked. In that case Great Britain would have to take action in accordance with her recent treaty.³ Then came the decree of the French Convention of November 16, 1792, which declared the river Scheldt open to the enjoyment of the riparian states. France supported the decree on the basis of natural law, though less idealistic reasons for such a policy readily suggest themselves.⁴ It was only too obvious how admirably the opening of the river served French purposes and extended French power. Great Britain, bound by desire as well as by treaty to support Holland, and eager to prevent the establishment of the French on the river and the conversion of Antwerp into an arsenal, opposed the decree as a violation of the sanctity of treaties.⁵

The effect of the decree on Anglo-French relations was soon felt. The speech from the throne of June 15 had declared that His Majesty's "principal care would be to preserve to his people the uninterrupted blessings of peace". When Parliament reassembled

¹ Flassan, *Histoire Générale*, Vol. VII, pp. 399-406.

² Article 2: C. F. de Martens, *Recueil de Traité d'Alliance*, &c., Vol. IV, p. 373.

³ Mr. Pitt to the Marquis of Stafford, Nov. 13, 1792: *The Diaries and Correspondence of the Right Honourable George Rose*, Vol. I, pp. 114-15.

⁴ The background of the decree is given by Albert Sorel: *L'Europe et la Révolution Française*, Vol. III, pp. 167-8.

⁵ *Rose Diaries*, *op. cit.*, Vol. I, pp. 160-1.

on December 13, shortly after the decree had become known, the tone of the speech was quite different. His Majesty declared that it was impossible for him to see "without serious uneasiness, the strong and increasing indications which have appeared there (in France) of an intention to excite disturbance in other countries—as well as to adopt towards my allies, the States General, measures which are neither conformable to the laws of nations, nor to the positive stipulations of existing treaties".¹ The position of the chief statesmen of the day on the importance of the French action with regard to the Scheldt is shown by an entry in the Malmesbury Diaries for December 11, 1792. Lord Malmesbury records a dinner at which Charles Fox, the Duke of Devonshire, Grenville, and Lord Fitzwilliam were present: "No one, not even Fox himself, called in doubt the necessity of assisting the Dutch if attacked; but he, and he only, seemed inclined to think the opening of the Scheldt was not a sufficient motive and would not even be considered as such by the Dutch themselves."² Rose had no doubt as to Great Britain's obligation to oppose the opening of the Scheldt, for France "had violated the treaty by which the navigation of the Scheldt was closed against foreign nations—a treaty made with the sanction of England, between the two governments of the countries through which that river flows".³

As relations became more strained, the French Government made an attempt to come to an understanding through Chauvelin. His instructions, dated December 9, allowed him to make concessions on certain points in dispute but he was instructed that "sur l'affaire de l'Escaut, la France ne ferait aucune concession".⁴

The negotiations produced little result except increased friction. Meantime, the question was being debated in Parliament. Sorel quotes Dundas, speaking for the Government, as saying: "Quant à la guerre, je prie Dieu qu'il nous en préserve; mais elle est inévitable si les Français ouvrent l'Escaut, car les traités de ce pays-ci avec la Hollande nous forcent à maintenir le clôturé de ce fleuve."⁵

¹ R. Fell, *Memoirs of the Public Life of the Late Rt. Hon. C. J. Fox*. Speech of June 15, Vol. II, p. 267; of Dec. 13, Vol. III, p. 268.

² *Diaries and Correspondence of James Harris, first Earl of Malmesbury*; edited by his grandson. Vol. II, p. 474. Fox's view was: "If the exclusive navigation of the Scheldt, or any other right belonging to the States General, has been invaded, the French Executive Council are the invaders, and of them we must ask redress." Fell, *op. cit.*, Vol. II, p. 295. He proposed sending a minister to France to discuss the question in dispute. Vol. II, p. 293.

³ *Rose Diaries, op. cit.*, Vol. I, p. 161.

⁴ Sorel, *op. cit.*, Vol. III, p. 226.

⁵ Sorel, *op. cit.*, Vol. III, p. 327.

In the end, war did prove inevitable. The formal declaration was communicated to the two houses of Parliament on February 11, 1793. Questions other than the opening of the Scheldt contributed to the final break, but the decree of November 16 played no small part. Great Britain was evidently willing to contemplate war in support of a treaty closing an international river to the enjoyment even of riparians. She unquestionably had good reasons for such action. The right of one nation to abrogate international treaties at will, the obligation to aid an ally, and a proper regard for the necessities of national defence, were all involved.¹ But the result is equally evident. Great Britain was strongly on the side of an unjust commercial restriction, viewing the question entirely from a political, not an economic, point of view.

From the time of the rise of Napoleon until 1814 British theories as to the Scheldt or other international rivers received slight consideration. As the war progressed, first the Belgic Provinces, then Holland, were added to the French Empire, and the Scheldt ceased to be an international river. Meantime, Antwerp's possibilities did not escape Napoleon's attention. The city was fortified and equipped as a strong naval base.² The French plan of direct action against Great Britain failed of its object, but the degree of apprehension felt in London is reflected in the instructions given to Lord Castlereagh on his departure as plenipotentiary to negotiate peace in 1814. The traditional policy is stated definitely. He is informed that "the objects *sine qua non* upon which Great Britain can venture to divest herself of her conquests in any material degree, are : (1) the absolute exclusion of France from any naval establishment on the Scheldt, and especially at Antwerp; and (2) the security of Holland being adequately provided for by a Barrier under the House of Orange . . .".³ In the treaty which followed, British policy with regard to the Scheldt was satisfied in every point. Although the river was opened, Dutch interests were amply protected and Great Britain was relieved of all fear of the hostile use of the Scheldt by the double safeguard of the separation of France from the river by the new kingdom of The Netherlands, and by a special

¹ *Cambridge History of British Foreign Policy*, Vol. I, p. 236. The course of the negotiations between the two countries and the causes of friction are discussed in ch. 2, pp. 216-65.

² G. Kaeckenbeeck, *International Rivers*, p. 60 n.

³ Memorandum of the Cabinet, Dec. 26, 1813: C. K. Webster, *British Diplomacy, 1813-15*, p. 124.

clause in accordance with which the arsenal at Antwerp was to be demolished, and Antwerp in future was to be purely a port of commerce.¹

The same year that saw the successful termination of one policy also saw the beginning of another. The old policy had succeeded, and a new one based on similar lines was no longer needed. More important still, by 1815, the effects of the industrial revolution were already beginning to make themselves felt. From this time onward Great Britain ceases to be on the side of restriction, and becomes an increasingly ardent advocate of complete freedom of navigation.² Her first step was to obtain the recognition of the fundamental principle that an international river should be open to the use of all the world. As this principle has come to be accepted and applied to one river after another, Great Britain has worked in a variety of ways to secure the practical enjoyment of what had been granted in theory.

Her new policy towards international rivers was shown definitely during the discussions of the Peace Conference in 1815. The work of drawing up regulations for rivers in accordance with the liberal provisions of the Treaty of Paris was left to a commission consisting of Austria, France, Great Britain, and Prussia, with several lesser Powers. The Prussian representative proposed to narrow the grant of complete freedom of navigation by guaranteeing it merely "*sous le rapport du commerce*". Lord Clancarty, for Great Britain, objected that such a restriction was not in accord with the intention of the Treaty of Paris, which had provided for freedom for all without condition. As a substitute for the Prussian motion, Lord Clancarty suggested an article which in perfect clearness of expression in favour of complete freedom exceeded even the Treaty of Paris. However, the other members of the Commission were of the opinion that there could have been no intention to treat riparian and non-riparian states on a footing of equality, and supported the Prussian view.³ At the time, Great

¹ This point is discussed by Ernest Nys: *Une Clause des Traités de 1814 et de 1839: "Anvers, Port de Commerce"*.

² In this connexion, the controversy over the St. Lawrence River should be mentioned, though outside Europe. Great Britain imposed restrictions on the navigation of this river in 1824, but the situation is complicated by the fact that the United States was asking, not merely for the use of the river, but for the recognition of a natural right of navigation. When this claim was abandoned the restrictions were removed. *British and Foreign State Papers*, Vol. XIX, pp. 1067-1106.

³ The protocols of the conferences of the Commission are contained in F. Schoelk, *Congrès de Vienne*, Vol. III, p. 96-Vol. IV, p. 170. The article suggested by Lord Clancarty is in Vol. III, pp. 115-16; his reasons for opposing the Prussian suggestion are

Britain apparently lost. The Prussian wording was adopted, but its meaning was so much a matter of doubt that within a few years it was found possible to read the British interpretation into it.

The first opportunity was furnished by the Belgian Revolution of 1830, which made necessary a reconsideration of the régime of the Scheldt. The matter was arranged by a conference of the great Powers, meeting in London. Great Britain naturally took a leading part. At the time of the beginning of the conference Holland was blockading the mouth of the Scheldt and the adjacent coast. The conference decided at its first session that all hostilities should cease, and Holland agreed. On one excuse or another, however, she continued to maintain the blockade of the river. Great Britain insisted that the blockade must be raised before any negotiations could be carried on. Writing to Viscount Granville in January 1833, Viscount Palmerston states that "recent accounts which have been received from Antwerp seem to indicate that the Dutch Government have given orders to prevent any ships from going in or out of that river; and it will be requisite to ascertain from the Baron de Zuylen that the navigation is free, before any negotiation can be entered into upon the subject of the Convention or Treaty".¹ Eventually the blockade was raised, and negotiations began. Holland made it evident that she regarded the Scheldt as a matter between herself and Belgium, and that the assistance of other Powers was not desired. This attitude led Earl Grey to suggest that "if the question of the navigation of the Scheldt has been treated as one affecting all European Powers, it has been so only in consequence of the claims of the Belgian Government having been founded on the Treaty of Vienna, by which the general rights respecting the navigation of that river have been secured".²

In the end a settlement was reached between the Great Powers, and virtually imposed on Belgium and Holland.³ What is of chief interest in the new system is that although the provisions of the Treaty of Vienna relative to freedom of navigation are extended to the Scheldt, these rules are so interpreted by specific provisions as to leave no doubt that the vessels of all nations are to be admitted. Thus the liberal position for which the British delegates

in Vol. IV, pp. 39-40. There is a brief summary of the discussions of the Commission in G. Kaeckenbeeck, *International Rivers*, pp. 40-60.

¹ *State Papers*, 1833, Vol. XLII, 1, Part C, p. 97.

² *Ibid.*, Part B, p. 175.

³ The protocols are contained in the above volume, Part A. For a discussion of the conference see le Baron Guillaume, *L'Escaut depuis 1830*, Vol. I, ch. 2, pp. 21-104.

worked in vain at the Conference of Vienna was applied, and for the first time an international river was declared open to the use of the whole world. Since then this precedent has been followed with regard to one international river after another.¹

One obstacle to freedom of navigation on the Scheldt was left: a toll in favour of the Dutch. To avoid the disastrous consequences to the commerce of Antwerp the Belgian Government decided to assume the charge itself and refund the toll, but the burden proved too great. A way out was found by Baron Lambertmont who induced some twenty states to buy up the toll.² Again Great Britain helped. How largely she valued free intercourse may be seen by the proportion of the sum which she assumed. Out of a total of 17,141,640 florins, Great Britain paid 8,782,320, or just above half. The next contributor in size of share paid about a tenth of the total: Prussia, with 1,670,640 florins.³

II

The Danube.

Meantime, conditions on the Danube had served to attract attention. By the Treaty of Adrianople (1829) Russia obtained the islands of the delta. She was thus placed in a strategic position on the Danube similar to that of Holland on the Scheldt. Great Britain saw reason to protest. Not foreseeing the future, she also protested against the provision which freed the Danubian principalities from the necessity of furnishing grain supplies for Constantinople, and for the Turkish arsenal. It was this very provision, by breaking the Turkish monopoly on the grain supply, that made possible that large British trade with the principalities that was to become of first importance in a few years.⁴

The development of this trade was very rapid. In 1839 the number of British vessels visiting the Danube on an average of three years was 8; by 1849 the number had increased to 215, with 150 foreign vessels in addition.⁵ No wonder Great Britain showed

¹ On the significance of the Treaties of 1839 on the development of the international law of navigable rivers see van Eysinga, *Les Fleuves et Canaux Internationaux*, Bibliotheca Visseriana, Vol. II, p. 142.

² A discussion of the negotiations which resulted in this treaty is given in Guillaume, *op. cit.*, Vol. I, pp. 316-456.

³ Article 4, Treaty of 1863: *British and Foreign State Papers*, Vol. LIII, pp. 13-14.

⁴ *British and Foreign State Papers*, Vol. XXVI, p. 1298; also J. P. Chamberlain, *The Régime of International Rivers: Danube and Rhine*, pp. 30-1.

⁵ Report of Vice-Consul Cunningham, Sept. 30, 1850. *British and Foreign State Papers*, 1853-4, Vol. XLIV, p. 441.

concern when river traffic was severely hampered through the lack of any official pilotage system, and through neglect. An additional difficulty existed in the fact that the grain exports from the Danube, bound mainly for London, came into direct competition with similar Russian exports from Odessa. Any increase in lighterage charges, due to shallow water on the bar of the Danube, decreased this competition by increasing freight charges to England and raising the price of grain there. It was estimated in 1850 that a difference of two feet in the height of water on the bar would cost British trade and shipping £30,000 in one season.¹ British protests, however, were not based solely on her own interests in Danube navigation. She had regard also for world commerce protected by the provisions of the Treaty of Vienna which she held to be part of the public law of Europe.²

Before these protests received real satisfaction the Crimean War broke out. But the experience of these years was not forgotten when the British negotiators discussed the future control of the Danube at the close of the war. The discussions of chief importance for the Danube took place, not at the Conference of Paris in 1856, but at a preliminary Conference held in Vienna in March 1855. Austria, France, Great Britain, Russia, and Turkey were represented. The way for the Conference had already been prepared by an agreement between the Great Powers on a list of four essential points which Russia had accepted. These four points were now adopted as the basis of discussion. Point No. 2 assured complete freedom of navigation on the Danube. The principle for which Great Britain had worked at the Conference of Vienna was accepted for the Danube, as it had been for the Scheldt. This matter settled, the British representatives turned their attention towards another objective. Point No. 2 had sought to ensure the promised freedom through the creation of "une autorité syndicale permanente".³ It was generally understood that this syndicate would be composed of riparian states. Lord John Russell now asked that Great Britain be represented on this commission. The proposal met with immediate opposition, particularly from Austria. She regarded the inclusion of non-riparian states in the control of an international river as entirely contrary to the provisions of the Treaty of Vienna, and she would allow no such

¹ *British and Foreign State Papers*, Vol. XLIV, p. 435.

² The correspondence between Great Britain and Russia relative to conditions on the Danube is contained in *British and Foreign State Papers*, Vol. XLIV, pp. 417-76.

³ The Four Points, the protocols of the Conferences, and the agreement arrived at are contained in G. F. de Martens, *Nouveau Recueil Général de Traités*, Vol. XV, pp. 633-99.

innovation on the Austrian section of the river. Lord John Russell persisted. He had at first relied on the large share which Great Britain had in Danube commerce. He now called attention to the necessity of providing adequately for the removal and prevention of obstacles to navigation. The riparian states remained opposed to the inclusion of an outside Power in a position of authority. The end was a compromise. What Great Britain had desired was representation on a permanent international commission of control for the whole river. What she obtained was representation on a commission whose existence was understood to be temporary, probably two years, and terminable by common consent, and whose jurisdiction was limited to certain duties on the lower section of the river. However, Great Britain got more than appeared. The European Commission did not cease after two years. It is still in existence, with powers which have been defined and greatly extended from time to time,¹ while the principle that interested as well as riparian states should be included in commissions of control for international rivers has come to be quite generally accepted.

The subject of the Danube has been discussed with British help at frequent intervals since 1856. In 1871 a Conference was called in London to revise the Treaty of 1856. Great Britain introduced two proposals, both characteristic of her policy. The first was in answer to an Austrian suggestion that certain works should be carried out at the Iron Gates with a toll to cover expenses. The British reply was concerned with making more precise and definite the exact extent and application of the tax. Her second proposal related to the European Commission of the Danube. She asked an extension of its life for a period of twenty-six years, and of its powers as far upstream as Ibraila. Both points met with objection in the Conference, but there was general agreement to the extension of its life for twelve years with no extension of its jurisdiction.² That was but a beginning. The European Commission is still in existence; its powers were confirmed by the Definitive Statute of 1921. Its control has been extended to Ibraila, and the Treaty of Versailles added a British representative to the International Commission in control of the upper section of the river.³

¹ For the powers of the Commission, see Chamberlain, *op. cit.*, ch. 3, pp. 46-98; also *The Advisory Opinion of the Permanent Court of International Justice on the Competence of the European Commission of the Danube between Galatz and Braila*, Publications of the Court, Series B, No. 14.

² *British and Foreign State Papers*, Vol. LXI, pp. 1193-1227.

³ Article 347.

III

General Principles.

The Peace Treaties of 1919 made other changes. The idea of an international commission of interested states to govern rivers of international concern was extended to the most important German rivers, and Great Britain was given representation on the new commissions. This plan had resulted from the work of the Commission on the International Régime of Ports, Waterways, and Railways. At an early meeting of this Commission Great Britain with France had favoured the discussion of general principles before the consideration of specific rivers. The pressure of time made the temporary abandonment of the plan necessary, but when the articles of peace had been prepared Great Britain for the second time brought forward the subject of general principles. The plan was again postponed, this time owing to the opposition of the United States.¹ At the Conference of Barcelona the idea was at length carried out, and Great Britain's position in relation to the regulation of international rivers is clearly shown by her ratification of the more liberal of the two optional clauses attached to the Convention.

The two phases of British policy towards continental rivers, for which the year 1815 serves as a dividing line, have much in contrast. In the earlier period British interest was limited, and her policy, dominated by political motives, was restrictive of commercial freedom, denying navigation on an international river even to the co-riparian states. In the second period British interest has widened to include all international rivers, and many national ones as well. British policy, directed in the main by a regard for commercial development, has worked to obtain the opening of rivers to the enjoyment of all the states of the world. Yet the two periods have certain points in common. In both, continuity of purpose has been a characteristic. In neither period has any regard been paid to the idea of a natural right of navigation, a theory to which the United States and France in particular have been devoted. Repeatedly before 1815, Great Britain denied the existence of any such right, and since that time she has not turned to that theory to justify the demands she has made for complete enjoyment and a share in the control of international

¹ Temperley, *History of the Peace Conference*, Vol. II, pp. 105, 92-112.

rivers.¹ Rather, she has found justification in her interpretation of the relevant provisions of the Treaty of Vienna, which she regards as forming part of the public law of Europe, and in her great position as a maritime and commercial nation.

Success has been a feature of both periods, but most strikingly so of the second period, when the policy has been of a constructive and progressive nature. Point after point has been satisfied. The British stand for the liberal interpretation of freedom of navigation has been applied first to the Scheldt (1839), then to the Danube (1856), and the Rhine (1868), and is now universally accepted. The British demand for the representation of interested states other than riparians on the international commissions of control was temporarily acceded to in 1856, but by the recent peace treaties was given general application; the Barcelona Convention was an answer to the British desire for the formulation of a general statement of principles of navigation to which all states could adhere. Finally, British opposition to the idea of a general and natural right of navigation has come to be very largely the accepted position. The right to navigate even an international river is now regarded as resting on convention. In short, to British policy the present day owes many of its most widely accepted ideas as to the regulation of navigable rivers of international concern.

¹ The British position towards European rivers only is being considered here. With regard to extra-European rivers there has been less consistency.

INTERNATIONAL POSTAL CONGRESSES

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THE ninth International Postal Congress of the Universal Postal Union was held in London during May 1929. Every five years representatives designated by their governments meet to discuss improvements in the service of the Union, a Union which is indeed universal, for with the accession of Afghanistan last year it now includes every country in the world with the following exceptions: Nigeria and Northern Rhodesia, Arabia, the Malay States of Johore and Trengganu, the Laccadive and Maladive Islands, the State of the Alaouites, and the Tonga Islands.¹

The organization of a Postal Congress is astonishing in its efficiency when one realizes that in a session lasting only four or five weeks about 180 delegates representing all nations of the world will consider between 1,200 and 2,000 propositions embodying technical rules for the exchange of letters, parcel post, letters with value declared, money orders, air mails, and two other auxiliary services, the so-called "collection of bills" service (*virements postaux*) and the service of subscription to journals. Postal administrations are not merely governmental agencies for the transmission of correspondence by land, sea, and air, but in a sense they are banking, educational, and commerce-promoting agencies as well. The propositions concerning all these manifold operations are sent by the various administrations of the Union to the International Bureau at Berne fully a year in advance of the Congress. They are then printed in a huge volume entitled "*Cahier des Propositions*", and are distributed to all the administrations for their examination and comment. One great advantage of this system lies in the fact that postal experts actually handling the mails may be consulted on the agenda before the Congress. In the New York Division of Foreign Mails, for example, Division meetings are held by the Superintendent with his foremen and supervisors concerning important alterations of the Convention, the Convention being a sort of code governing the conduct of the Division.

¹ A list of countries of the Union indicating size, population, and class for payment of expenses of the Union is always given in the Annual Report. See *L'Union Postale Universelle, Rapport de Gestion, 1928*, pp. 30 *et seq.*

The remarks and counter-propositions of each administration are communicated to the Bureau, which compiles a second edition of the "Cahier", eliminating duplications and printing the remaining seven to nine hundred propositions in one column with alternative propositions and reasons or objections in the right-hand column, over the name of the administrations objecting. These "Cahiers" are secret documents until the close of the Congress when they are republished as Volume I of the Documents of the Congress. They constitute the agenda of the Congress, and it is very difficult to bring propositions which have not been included in the "Cahier" before the Congress.

The work of preparation has grown so enormously that a new bit of international administrative machinery has been instituted to aid the Bureau. This is the so-called "Study Commission" (Commission d'Etudes), first set up by the Congress of Madrid in 1920 for the purpose of simplifying the complicated convention, arrangements, règlements, and protocols signed at each Congress.¹ Two meetings of this body were held prior to the Congress of Stockholm, 1924, and a new plan of reorganizing all the Acts of the Congress was approved by the Union administrations. At that Congress the Study Commission was increased from seven to fourteen, the members were to be paid, and the expenses divided in the same ratio as the Bureau budget. Apparently this arrangement will be permanent. The Study Commission is composed exclusively of postal experts who meet six months before the Congress and make recommendations which are embodied in the second edition of the "Cahier". All the propositions are submitted to the Congress, but the recommendation of the Study Commission bears great weight.

Between ten and fifteen Acts are signed at each Congress. The delegates, although they are usually high postal officials, are present in a dual capacity, as diplomatic representatives of their respective governments and as representatives of their administrations. They sign the principal convention, as the first line of the preamble shows, as plenipotentiaries of their governments, and likewise the "arrangements" for the auxiliary services such as money orders, insured letters, &c. These documents provide that the administrations may draw up "Règlements de Détail" for the execution of the convention and arrangements. The chief difference appears to lie in the fact that the règlements are signed in the names of the various administrations and do not require ratification.

¹ Proposed by Sweden. *Documents du Congrès de Madrid*, Berne, 1921, Vol. II, p. 743.

The practice has been to hold each succeeding Congress in a different capital. The Postmaster General of the state in which the Congress is held, or his equivalent, is usually the Chairman. After the welcoming speeches, credentials having been verified, a Vice-President is elected, the Secretariat of the Congress appointed, and the Rules for the Conduct of the Congress adopted. The various committees are then appointed; the principal one deals with letter mails, others with money orders, insured letters, &c. Several days then intervene before another plenary session of the Congress.

Here one may notice the first signs of conflict among the members of the Union, that is, the antagonism of large and small states. The first outburst was at the Congress of Rome, 1906, when the Greek delegate, supported by the delegates of French Indo-China, the delegate of the other French colonies, as well as those of Peru, Montenegro, Venezuela, Chile, Cuba, and Tunisia made the following declaration:

“Of the 57 delegations only 30 were called to take part in the preparatory work of the Congress. There were 30 countries chosen by the President to occupy the 69 seats which were available in the three commissions. The first contained 25, the second and third 22 each. Thus there were 27 delegations, among them Greece, which remained out of the three commissions.”¹

Seats on commissions are highly prized, for much of the real work of the Congress is done in the commissions. Starting with the very difficult Congress of Madrid, 1920, when an international postal system disrupted by the war was to be patched on the basis of depreciated and fluctuating currencies, one can see the tremendously increasing importance of the rôle of the commissions. They appoint their own Secretariat and Rapporteurs; their procès-verbaux are printed in the Documents of the Congress; they have speeches of welcome, and of congratulations when their reports are ready.

Temporarily satisfied by a change in the distribution of seats, the small nations again protested at the Congress of Stockholm, this time on the ground that the initial unit of transit rates being as great as 1,000 kilometres discriminated against them. On the whole, however, the contentions between large and small countries are insignificant when compared to the immense problem of the amount of transit charges to be paid.

The principal conflict of the Union and one which has split every international postal meeting since the first Conference of

¹ *Documents du Congrès de Rome*, Berne, 1906, Vol. II, p. 564.

Paris in 1863 concerns the principle of gratuity of transit. This must not be confused with the principle of liberty of transit which is conceded by all. Gratuity of transit means the transport of mails for other administrations free of charge. At various times in the fifty-five years of the history of the Union different countries have supported the doctrine. Italy, an early supporter, is now against it. Germany, the United States, and all the South American countries (especially Uruguay) have always been staunch supporters of the principle. France and Belgium have always bitterly opposed it.

The reason is obvious to those who have studied the statistics of the international postal traffic. Even at the present low transit rates (and the history of the Congresses is the story of the progressive lowering of transit rates) France and Belgium derive a considerable income from the transport of mails of other European countries across their territories to and from the sea ports. Because of their geographic situation they act as a sort of "carrefour" of European traffic and so perform far more services for other countries than they receive in return.

Germany and the United States, it seems, are disinterested and might even lose by a victory of the principle, but Uruguay pays a great deal for transit services and is the staunchest of supporters. Jugo-Slavia, on the other hand, is situated like Belgium and carries European and overseas mails across her territory to the Near East. At one Congress she threatened that if the principle of gratuity of transit prevailed she would henceforth see that her railroad cars first took care of her domestic service, and "the result would be the veritable disorganization of the great lines of transport".¹

Slowly the principle seems to be gaining headway. The progressive lowering of transit rates may be considered as successive steps in this direction. It is curious to note the duplication of this evolution in the Austro-German Postal Union of 1856 which preceded the Universal Postal Union, and, in miniature, seemed to anticipate its history. There transit charges were gradually lowered and finally wiped out.

Restricted Unions for the improvement of conditions of exchange of mails, the lowering of postage rates, or even complete gratuity of transit, have always been permitted by the principal convention of the Postal Union. In this way the principle of gratuity of transit was gradually adopted in the United States-Mexican, the Spanish-Portuguese, and some of the South American

¹ *Documents du Congrès de Vienne*, Berne, 1891, p. 383.

postal relationships, of which the last are the most important. As early as the Congress of Vienna, 1891, one can detect the formation of a Latin-American *bloc*. It is worthy of note that the eminent international lawyer Señor Carlos Calvo then represented the Argentinian Republic.

The Latin-American Postal Union was formed at Montevideo in 1911, and became the Pan-American Postal Union by the accession of the United States in 1922. Spain is also a member. All members carry the mail of other members free of charge, with the exception of Panama, which has entered a reservation on the principle of gratuity of transit. In respect of transit, then, Panama occupies in the New World the place which Belgium holds in the Old. The only other restricted Union of importance is the Nordic (formerly the Scandinavian) Postal Union which includes Norway, Sweden, Denmark, and Finland. Unlike the Pan-American Postal Union it is not a full-fledged Union, for the latter has a Bureau organized on the lines of the International Bureau at Berne and has regular Congresses like the Universal Postal Union.¹

The struggle for universal acknowledgment of the principle has not ceased. In 1924, at the Congress of Stockholm, the discussion reached a fever pitch.

"The Mexican delegation does not wish to insist before this eminent assembly upon its own relation to gratuity of transit . . . but wishes to give some explanations, for during the discussion of this question in the first commission the honourable delegate of Portugal, perhaps by reason of his vehement character, has uttered some charges which the delegation of Mexico cannot and ought not to accept and which it cannot allow to pass without an answer.

"As regards the special case of Portugal, the gentleman can rest at ease, for Mexico never employs that route for its correspondence.

"The facts are sufficient to show that our proposition is presented without egoistic, ulterior motives; on the contrary, they show clearly that the only aim we seek is the realization of the most beautiful of ideals of the Universal Postal Union."²

It is impossible to predict what the outcome will be. On the whole Great Britain and the colonies are opposed to the principle. In past Congresses the pressure of the opinion of a large majority of delegates has had great effect in bringing about reforms, but all one can say for the future is that this question is bound to occur again and again.

There are two minor questions which have divided the

¹ Oficina Internacional de la Union Postal Panamericana, Congreso de Mexico, 1926, Montevideo, 1927.

² *Documents du Congrès de Stockholm, Lausanne, 1924, Vol. II, p. 753.*

administrations. The first relates to votes for colonies and the second to international mails in time of war. Starting with the Congress of Berne, 1878, which met for the purpose of admitting British India to what was then *l'Union Générale des Postes*, one can see the beginning of the opposition to the "massing of votes around a single nation". At that Conference India was admitted, but on equal terms with the French colonies. The race for votes was on; the prevalent ideal being the maintenance of a certain balance. At the next Congress, at Lisbon in 1895, Canada was given a vote, but she was represented by the British representatives. Portugal received a vote for her colonies. Although no other new votes were granted the signs pointed clearly to a radical change, for Denmark and Spain signed for Denmark *and* the Danish colonies, Spain *and* the Spanish colonies, respectively.

A great expansion took place at Washington in 1897. The whole of the British colonies of Australasia were admitted as a separate postal administration, and though another vote was granted for the whole of the other British colonies the final protocol appended to the principal convention provided that this vote might be exercised by the British colonies and protectorates of South Africa. Germany, Denmark, Spain, and the Netherlands received one vote each for their colonies, and France received an additional one for Indo-China.

In 1906 at Rome several more votes were granted. Great Britain retained her vote for "the rest of the British colonies", but the colonies and protectorates of South Africa received a vote in their own right. A further extension was foreshadowed, for the final protocol gave the right of exercising the vote of "the rest of the British colonies" to New Zealand. Almost all the great Powers received additional votes. Germany, France, Portugal, and the Netherlands each received one more for some particular part of their colonies, and the United States and Italy received one additional vote for the first time.

As a result of the war, when the Union met at Madrid in 1920, Germany lost her two additional votes, but Japan received two. Belgium added one for the Congo, and the United States received one to be exercised for the Philippine Islands, while retaining another for her other insular possessions. Having sold the Virgin Islands, Denmark lost her only colonial vote.

The fears of the non-colonizing countries were voiced at Stockholm in 1924 by the Swiss delegate.

"At Vienna there were eight colonies, Washington 11, Rome 18, Madrid, 19.

To-day three new votes are demanded which will bring the total to 22 not including Tunisia and the Zones of Morocco.

"Where will this bring us? One knows by experience that as soon as one of the Powers has received a new vote the others do not wish to be left behind. The impression is becoming widespread that votes for colonies are demanded in order to obtain a numerical superiority in Congresses. . . . Many of the countries without colonies, among whom are some very important ones, begin to feel a certain unrest. The atmosphere which results from this situation aroused certain protests and painful discussions at Madrid which disrupted the harmony of the common work and finished by having a disorganizing effect. Twenty-two countries, sixteen of which are in America, have not ratified the Treaty of Madrid.

"It is preferable to hold to a single principle adopted by the founders of the Union, that countries, not administrations, are treated on the same plane of equality. At Madrid the United States and Spain demanded that votes for colonies be radically suppressed."¹

The cause of this outburst was the proposal for the granting of a new vote to the new Irish Free State. Mexico, Switzerland, and Soviet Russia opposed the resolution, which, however, was passed "octroyée par acclamations". Immediately the representatives of the U.S.S.R. proposed to grant four votes to the four republics constituting the U.S.S.R. The resolution failed by 23 to 1. The situation in 1929 is as follows:

"The following are considered as forming a single country or administration of the Union as the case may be, within the meaning of the convention or of the agreements, so far as concerns, in particular, their right to vote at a Congress or Conference, and in the interval between meetings, as well as their contributions to the expenses of the International Bureau of the Universal Postal Union.

- "1. The whole of the Belgian Congo.
2. The whole of the island possessions of the United States, except the Philippine Islands, and including Hawaii, Porto Rico, Guam, and the Virgin Islands.
3. The Philippine Islands.
4. The whole of the Spanish Colonies.
5. Algeria.
6. French Colonies and protectorates of Indo-China.
7. The whole of the other French Colonies.
8. The whole of the Italian Colonies.
9. Chosen (Korea).
10. The whole of the other Japanese Dependencies.
11. The Dutch East Indies.
12. The Dutch Colonies in America.
13. The Portuguese Colonies in Africa.
14. The Portuguese Colonies in Asia and Oceania."²

¹ *Documents du Congrès de Stockholm*, Lausanne, 1924, Vol. II, p. 208.

² Article 8, Convention principale, Stockholm, 1924.

Not included in the above list but voting as completely independent units were "Great Britain and various colonies and protectorates", Australia, British India, Canada, Irish Free State, New Zealand, Union of South Africa.

In this immense machinery of international postal communication and with so many points of contact disputes are bound to arise. In 1874, when the Union was founded, an excellent bit of machinery for the settlement of postal disputes by arbitration was set up and has been continued in every succeeding postal convention and arrangement. The chief value, however, lies in the preliminary steps, which usually resolve the difficulty before it comes to be litigated. The Bureau at Berne has power to give an advisory opinion on disputed questions (*questions litigieuses*) at the demand of both parties. It may also give an opinion on *questions non-litigieuses* at the demand of one party. Most questions have been settled by advisory opinions; there may be as many as a hundred such each year, but in the forty years of the Union's history up to the beginning of the late war, there were only three arbitrations.

Since 1920 there have been seven arbitrations, one in 1925 between the United States and Norway being the most important in the history of the Union. Arbitrations usually involve the interpretation of the convention or of the arrangements for auxiliary services, or they may involve the application of the principle of responsibility for mail matter being transported. The procedure is fairly simple. The case and counter-case are presented to the Bureau. If an advisory opinion of the Bureau is not asked for, or is not accepted when rendered, each administration designates another administration not directly interested in the matter to act as arbiter. In the event of one of the administrations failing to take this necessary step, the Bureau is now empowered to designate an administration to act for the delinquent administration. In case the two administrations acting as arbiters cannot agree, they choose a third administration which will decide.

The United States-Norwegian dispute concerned the maritime transit charges from 1914 to 1919, but it was really a test case, for analogous suits with Denmark and Sweden would be settled by the decision. After refusing to arbitrate with Sweden, the United States finally agreed, in 1924, to arbitrate with Norway. The United States claimed that Section (c) of Article 2 of the Convention of Rome, providing for a transit rate of 8 francs per kilo, governed the United States-Scandinavian postal relationships, whereas

Norway claimed that Section (b), providing for a 4 franc rate, governed.

The arbitrators, the Swiss and Hungarian administrations, declared that the American stand "would render the whole system of payment illogical and incomprehensible", and decreed that the United States must pay Norway the sum demanded with interest at 5 per cent.¹

The increase of arbitrations since the war is not necessarily a result of the war. The work of the Union has been considerably enlarged, and some of the disputes originated before 1914 and were not settled until after the war. Even the present small number of arbitrations and the willingness with which administrations accept its advisory opinions before resorting to the comparatively cumbersome procedure of arbitration show in what great esteem the Bureau is held.

The remaining problem, concerning international mails in time of war, has not yet been settled, although there was considerable discussion of the stoppage of neutral mails at the Congress of Madrid, 1920. As is generally known, the provision of the Hague Convention of 1907 for the immunity of private correspondence at sea was abandoned both by the Allies and by the Central Powers.² Far from being immune, the letter mails were interfered with to a degree never before contemplated, and the protests of Sweden and the United States in 1915-16 were unavailing.³

At the Madrid Congress Switzerland proposed that "closed despatches and letter correspondence under cover are inviolable in transit on land and sea". In explanation of the proposition the Swiss delegate declared that the principle of liberty of transit as provided for in Article 4 of the Principal Convention of Rome was often not observed in the World War: "the damage resulting was indisputably greater for the neutrals than the profit for the belligerents." At the close of the Congress this proposition had to be withdrawn because of the profound differences of opinion, but the discussion ended with this significant declaration:

"We declare, in conformity with the Swiss proposition mentioned, that closed despatches and open correspondence in transit are inviolable both at sea and on

¹ *L'Union Postale Universelle, Rapport de Gestion, 1925, pp. 14 et seq.*

² "Noordam" IX Lloyd's Prize Cases 229; "Königin Regentes", 11 Entscheidungen des Oberprisengerichts 244.

³ *Parliamentary Papers, Misc. (Nos. 9 and 20), 1916*; see *The Treatment of Mails in Time of War*, by Prof. Pearce Higgins in the *British Year Book of International Law* for 1928, p. 31.

land, and that consequently no country in the Union may submit them to the censor or sequestrate them in time of war."

Signed,

Delegates of United States, Argentine Republic, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Salvador, Uruguay, and Venezuela.

This was opposed, on the ground that a Postal Congress is not competent to deal with the question of military censorship, by Great Britain, France and her colonies, Algiers, Tunisia, Morocco, Belgium, Italy, Japan, Greece, Egypt, Rumania, Austria, India, Portugal and her colonies.¹

Here the matter rests, and there appears to be no hope for immunity of mails at sea without a thorough-going revision of the laws of maritime warfare. The other problems of the Union are less political in nature, and concern such technical subjects as the immense new field of the air mails. Political considerations nearly always hamper the speediest possible exchange of mails, especially in the matter of maritime transit, but there is reason to hope that these difficulties, as so many others, may be surmounted in the course of time.

¹ *Documents du Congrès de Madrid*, Berne, 1921, Vol. II, p. 758.

INTERNATIONAL RESPONSIBILITY OF STATES FOR JUDGMENTS OF COURTS AND VERDICTS OF JURIES AMOUNTING TO DENIAL OF JUSTICE.

By PROFESSOR J. W. GARNER, Professor of Political Science in the
University of Illinois.

THE acquittal by juries in several recent notable cases of the murderers of aliens or condemnations to short terms of imprisonment has raised the question, heretofore little discussed, as to whether verdicts of juries found in the face of incontrovertible evidence of guilt, or the imposition of penalties notoriously inadequate for the crime of murder, constitute a denial of justice for which the state in whose jurisdiction such acts take place is responsible internationally and therefore liable to make reparation to the state whose nationals are the victims of such crimes.

Passing over the instances of acquittals by juries of participants in mob outbreaks in which aliens were victims, such as those against Italians at New Orleans in 1890 and at Aigues Mortes (France) in 1893, we may call attention to two more recent cases in which the crime was not committed by a mob but in each case by an individual acting deliberately and upon his own initiative. The first was the assassination in Switzerland, by a Russian emigré of Swiss descent, of M. Vorovski, the Chief Russian Delegate to the International Conference at Lausanne in 1923, the accused having been acquitted by a jury in the face of incontrovertible evidence of guilt.¹ The Soviet Government held the Swiss Government responsible, and in consequence of the refusal of the latter government to admit its responsibility, the Soviet Government declared a boycott of Swiss goods and later resorted to other measures of reprisals, such as the expulsion of Swiss nationals from Russian territory. The other case was the action in 1928 of a Parisian jury in condemning to two years imprisonment only, the murderer (an Italian) of Count Nardini, Consul of Italy at Paris—a punishment which the Italian Government considered notoriously inadequate and which aroused strong indignation in Fascist circles throughout Italy.² The crime assumed a certain political aspect due to the fact that it was committed by an anti-Fascist who was apparently animated by a feeling of intense hostility to the existing political

¹ Toynbee, *Survey of International Relations*, 1924, pp. 258-9.

² See an editorial in the *Journal de Genève*, December 4, 1928.

régime in his own country, and who regarded the slaying of its consular representative at Paris as one method of attacking what was to him a detestable régime of which his country should be rid. There are certain crimes the authors of which Parisian juries will rarely convict or toward whom they are notoriously lenient. Among these are crimes having a political aspect and crimes committed in the heat of passion (*les crimes passionnels*). The acquittal of the murderer of M. Jaurès—a verdict denounced as monstrous by Anatole France—was a notable example of what has been called the “anarchistic” tendencies of Parisian juries. In this respect their attitude is the same whether the offenders are French citizens or aliens.

The fact that in the present case the victim was the official representative of a foreign government differentiated the case from ordinary cases of the assassination of private individuals, since it is admitted by text writers and by the decisions of international tribunals that the responsibility of a state to afford protection to the officials of a foreign government is larger than that in respect to private individuals, at least the duty of due diligence to assure them protection is admitted to be greater.¹ The position taken by the Italian Government in the case of the murder of General Tellini in 1923, for which Greece was held responsible, will be recalled in this connexion. The duty of a jury to convict where the evidence requires it is, however, no greater in the one case than in the other. In either case acquittal or the imposition of a grossly inadequate punishment would seem to be a denial of justice. Is it one for which the state in whose jurisdiction it occurs is responsible and bound to make reparation?

It is somewhat curious that neither the discussions of jurists and text writers nor the draft *projets* which have been prepared on the subject of responsibility of states for wrongs suffered by aliens within their territories deal with this particular form of denial of justice. It is generally maintained that by reason of the almost complete independence of the judiciary from government control in modern states, a state cannot be held responsible for injuries

¹ See the reply of the Committee of Jurists of the League of Nations in 1923, where it was said that “the recognized public character of a foreigner and the circumstances in which he is present in its territory entail upon the state a corresponding duty of special vigilance on his behalf”. *Official Journal*, League of Nations, 1924, p. 524.

See also Eagleton, *The Responsibility of States in International Law*, p. 137, and the authorities there cited, and the case cited by Borchard in his report on the draft submitted by him to the American Committee on the law of responsibility of states for damage done in their territory to the person or property of foreigners (1928), p. 73.

resulting to aliens from erroneous decisions of its courts, especially when applying or interpreting in good faith their municipal law, assuming of course that it is not in contravention of international law.¹ But it is generally admitted that the state is responsible for injuries resulting from the erroneous interpretation or application of treaties or rules of international law. There is also good authority for the view that the state may rightly be held liable for injuries resulting from a "grossly unfair" or "manifestly unjust judgment" by a national court, and in practice claims for reparation in such cases have frequently been espoused by governments and occasionally indemnities have been paid for the injuries thus sustained—this on the theory that such decisions are equivalent to a denial of justice.²

The Institute of International Law in its draft adopted at Lausanne in 1927 (Article 6), declared that the state is responsible "if the procedure (of its tribunals) or the judgment is manifestly unjust, especially if they have been inspired by ill will (*malveillance*) toward foreigners as such or as citizens of a particular state".³ It also declared the state to be responsible for injuries caused to foreigners by any action or omission contrary to its international obligations whatever be the authority of the state whence it proceeds: constitutional, legislative, governmental, or judicial. The draft formulated by an American Committee of jurists in

¹ The irresponsibility of the state for the wrongful decisions of its courts has sometimes been affirmed to be virtually absolute and without qualification. See, for example, the award of the Senate of Hamburg, as arbiter, in the *Croft Case* and the case of *Yuille, Shortridge Company* (Lapradelle-Politis, *Recueil* II, pp. 1 ff. and 78 ff.). This award is criticized by the editors of the *Recueil* on the ground that the judiciary is no less an organ of the state than the executive or legislative authorities, that the independence of the judicial organ from control by the government is an immaterial circumstance, and that the state, regarded as an entity, is responsible for the acts of all its agents or authorities whether they be judicial or otherwise.

This award may be contrasted with that of Martens in the case of the *Costa Rica Packet* where the Netherlands was held responsible for the error of a Dutch court in taking jurisdiction of a suit against a British subject for an act done outside the territorial jurisdiction of the Netherlands. The decision has been much criticized, but it has also been ably defended as being correct in principle, since the wrongful assumption of jurisdiction by the court was in violation of international law. See Borchard, *Diplomatic Protection of Foreigners Abroad*, pp. 332 ff.; Baty, *International Law*, pp. 227 ff.; Bles in 28 *Revue de Droit International*, pp. 452 ff.; Valery in 5 *Revue Générale de Droit International Public*, pp. 57 ff.; Reglesberger in 4 *ibid.*; and Strupp, *Völkerrechtliches Delikt*, p. 74.

² Some cases are cited by Borchard in the report referred to above, pp. 40 and 54.

³ The responsibility of the state for acts of the judiciary is discussed at length by the American-Mexican Mixed Claims Commission under the Convention of Sept. 8, 1923, in the case of *B. E. Chattin*, Opinions of the Commissioners, p. 422. Numerous cases involving "direct damage caused by the judiciary" are cited in this opinion.

1928 defines denial of justice for which the state is responsible as including the denial, delay, or exceptional difficulty of access to the courts, gross deficiencies in the judicial or remedial process, the absence of those guarantees which are indispensable to the proper administration of justice, or a "manifestly unjust" judgment. But it adds that an error of a *national* court which does not produce "manifest injustice" is not a denial of justice (Article 8). Oppenheim remarks (*International Law*, 4th ed., Vol. I, p. 303) that "Undoubtedly in case of such denial of justice or undue delay of justice by the courts, as is internationally injurious, a state must find means to exercise compulsion against such courts". And he adds that "the same is valid with regard to an obvious and malicious act of misapplication of the law by the courts which is injurious to another state". M. Charles Dupuis in his lectures at the Hague Academy of International Law in 1924 (*Recueil des Cours*, I, p. 359) maintained that states are responsible for the erroneous decisions of their courts when the decisions are contrary to international law, just as they are responsible for the acts of administrative authorities or legislative bodies in violation of international law.

The present tendency of juristic opinion appears to disregard the distinction between acts of the legislative, executive, and judicial authorities and to attribute responsibility to the state for all injuries suffered by aliens in violation of international law irrespective of the character of the public authority whose acts of omission or commission produced them—this on the principle that the state in its international relations speaks with one voice and that there is no place for distinguishing between the different agents through whom it speaks and acts.¹

If we admit that the state may justly be held liable for decisions of its national courts which result in injuries to aliens in violation

¹ The Sub-Committee (M. Guerrero) of the League of Nations Committee of Experts for the Progressive Codification of International Law, however, reaches a different conclusion in respect to the responsibility of the state for injuries resulting from the acts of the judiciary. "A judicial decision," it declares, "whatever it may be, even if vitiated by error or injustice, does not involve the international responsibility of the state." It admits that the state is responsible for *denial of justice*, but this it defines narrowly as the refusal to allow foreigners access to the courts. According to this view the decision of a court may be intentionally erroneous, it may be a misinterpretation of the law, or it may be "manifestly unjust", but the state is not responsible for injuries sustained by foreigners as a result of such decisions. Weak or backward states have sometimes defended this view in their controversies with other states, but it is not the view which the great Powers act upon in practice and it is approved by few, if any, jurists to-day outside Latin America and the Orient.

of international law, must we regard the verdict of a jury as being assimilable to the decisions of a court and therefore entailing the responsibility of the state when the verdict is "manifestly unjust" or the condemnation notoriously inadequate, so that it constitutes a denial of justice? In fact in some states the jury is empowered to determine the punishment or it has a share with the judge in determining it. In France the jury is competent to convict with extenuating circumstances, in which the court is bound to impose a lighter punishment than it may do in cases of verdicts of conviction without extenuating circumstances. In practice, a large majority of the verdicts of French juries in criminal cases are found with extenuating circumstances when they convict at all, so that in fact it is the jury rather than the court which plays the preponderating rôle in determining the degree of punishment which the guilty offender shall suffer. Not infrequently also French juries will acquit outright offenders in case the court refuses to give an undertaking not to impose a term of imprisonment beyond a certain number of years, in case a verdict of guilt is returned.

Under these circumstances, to maintain that a state may be held responsible for a manifestly unjust judgment of a court means little unless it includes also the verdict of a jury when it is equally unjust. In the vast majority of countries the jury is an integral and essential part of the machinery for the administration of criminal justice; it not only determines the guilt or innocence of the accused but, as indicated above, it often has the power to determine wholly or in part the penalty to be imposed in case of conviction. Judge and jury therefore are inseparable parts of the judicial organ, and for the act of either when it constitutes a denial of justice the state, it would seem, should be equally responsible. The argument that when a jury acquits an offender in the face of evidence establishing his guilt or fixes a penalty which is notoriously inadequate, it exercises a discretion which the municipal law confers upon it, would apply equally to any unjust judgment rendered by a court and of course to a legislative act which deprives an alien of rights to which he is entitled under international law. In all such cases it is not the discretion exercised by the jury, the judge, or the legislature which is reproachable, but the abuse of discretion which results in a denial of justice, for which the state is responsible under a well established principle of international law. The suggestion of Oppenheim that in such cases the state must find means of exercising compulsion against the courts, and *a fortiori* against juries, to prevent denials of justice, hardly seems feasible in view of

the conception which prevails to-day in all modern states relative to the independence of the judiciary of governmental control.

A more reasonable, if not wholly effective, remedy might be found in the reorganization of the judiciary and especially of the jury system. In 1893 the French Parliament passed a law depriving juries of their competence to decide cases involving offences against foreign diplomatic representatives. The committee which reported the bill urged its adoption on the ground that it was necessary "to insure a prompt and energetic repression of offences and outrages against the heads of foreign states or their representatives". Since juries are locally chosen from the community and are affected by local opinion which is often prejudiced against, and sometimes openly hostile to, aliens, the reform mentioned above might be carried still farther and jury trial abolished in cases involving crimes against *all* aliens, whether official representatives of foreign governments or private individuals. In most American communities, not only are juries selected from the immediate community in which the crime is committed, but even the judges and public prosecutors are popularly and locally elected, usually for short terms. Where local public sentiment is unfriendly or hostile toward aliens of certain nationalities, grand juries frequently will not indict offenders against them, public prosecutors will not always prosecute them, as least not with vigour, petty juries will not convict them, and even the judges may be affected to some extent by local public opinion. Under these circumstances participants in acts of mob violence against aliens, particularly those belonging to certain races, frequently go unpunished although their guilt is evident.¹ The substitution of executive appointment and central control of sheriffs and public prosecutors in the place of local popular election might facilitate the apprehension and prosecution of offenders against aliens, but it would of course have no effect upon the decisions of grand or petty juries. Public sentiment in the United States, as elsewhere, would not approve the abolition outright of jury trial in cases involving offences against aliens; consequently, so drastic a reform does not seem within the range of possibility. A succession of American Presidents, however, have urged that the Federal courts be given jurisdiction of cases

¹ Some examples are given by Watson in an article entitled "Need of Federal Legislation in Respect to Mob Violence in cases of Lynching of Aliens", 25 *Yale Law Journal*, p. 579. See also Hyde, *International Law*, Vol. I, p. 518; and Garner, "Responsibility of States for Injuries Suffered by Foreigners within their Territories, &c.", *Proceedings American Society of International Law*, 1927, p. 53.

involving offences against aliens and the local courts deprived of the competence they now have in such cases, for the reasons stated above. In that event such cases would be tried by national judges appointed for life by the President, and the question of guilt would be determined not by juries chosen from the immediate community in which the crime is committed but by juries selected from the state at large or at any rate from a region much larger than the county, and consequently they would be less influenced by local public sentiment. It is believed that this would insure a much larger number of convictions of offenders against aliens than is the case under the existing system of trial by locally elected judges and juries. The Congress undoubtedly has constitutional power to enact such legislation and it has found able advocates in both Houses at different times, but so far all attempts in this direction have failed, largely because of the "States' rights" opposition to it.¹

In addition to possible reforms in the organization of the judiciary and the jury system, the state might provide certain special remedies of a procedural character for aliens so as to enable them to obtain redress when on account of local prejudice the ordinary remedies which are sufficient for the citizen are ineffective. Such legislation would not be open to criticism as being discriminatory in favour of the alien but could be defended as necessary to put the alien and the citizen on an equal footing, so far as their judicial remedies are concerned. Even if the pursuit of the ordinary remedies by the alien and the citizen always led to the same result under like circumstances, it would frequently happen that the redress would be ineffective, for example, a judgment recovered in a civil action by a victim of mob violence, or his dependants, against a participant in a mob, when the latter possessed no resources out of which the judgment could be satisfied. In such cases, unless the remedy provides for the payment of damages out of the public Treasury, it is of little or no value. Some American states have recognized this fact and have imposed upon counties or cities the duty of compensating alien victims (or their dependants) of mob outbreaks within their territorial jurisdiction, when the fact of damage has been determined by a court. The same principle of local responsibility for indemnifying the victims of

¹ It is interesting to note, however, that the Federal Constitution recognizes the prejudice likely to exist against aliens and consequently the objection to leaving them to the protection of the local courts, when it confers upon the Federal Courts jurisdiction of *civil* suits between aliens and citizens of the United States. But it fails to go to the length which logic and justice would seem to require, by giving the same courts jurisdiction of cases involving crimes against aliens.

riots and mob outbreaks has long existed in Belgium, France, and certain German states.

It hardly seems likely that any reform either in the organization of the judiciary or in the procedure of the courts will remove entirely the possibility of denials of justice. So long as the independence of the judiciary remains, there will occasionally be judgments which, when measured by the "established standards of civilization", will be regarded as "manifestly unjust" and for which states will be held responsible and liable to indemnify aliens who have suffered injuries in consequence of such judgments. This responsibility is now admitted by the vast majority of jurists and text writers on international law, and the practice of states to-day is in accordance with this principle.

If this is a sound principle, it applies with equal force and logic to the verdicts of juries when they are manifestly or notoriously unjust. In short, there would seem to be no reason for distinguishing between a wrong resulting from the decision of a judge and one resulting from a verdict of a jury. There is little likelihood that trial by jury in criminal cases in which aliens are parties will be done away with or that the discretion which juries enjoy in determining the guilt or innocence of persons charged with crime will be materially restricted.

But the independence of the judiciary and the discretion which juries possess, if abused or so exercised as to result in denial of justice, can hardly be regarded as a logical or just reason for relieving the state of responsibility to other states for injuries which their nationals have suffered in consequence of such abuse. It involves no encroachment upon the independence of the judiciary or the discretion of juries to hold the state responsible for their errors or abuse of authority, when they result in a denial of justice. It would seem to be a sound principle that if the state is responsible for the internationally illegal acts of its agents when they result in injuries to the nationals of other states, there is no logical reason for drawing a distinction between categories of agents. A wrong attributable to an act of omission or commission on the part of an organ or agent of the state is a wrong, regardless of the status or character of the agent, whether he be an administrative functionary, a judge, or a juror, and unless the wrong is excusable for some reason or another the state should be regarded as liable to make reparation for it.¹ As Westlake observes: "When

¹ Compare Dupuis, *Recueil des Cours, Académie de Droit International à la Haye*, 1924, T. 1, p. 359.

there has been a denial of justice the state in which it has taken place stands as a unit to bear the responsibility of it. It cannot excuse itself by laying the fault on the judges or on a jury, however independent of the executive its constitution makes them."¹ International law is not concerned with the particular forms of organization which states adopt ; it merely proclaims their responsibility, leaving them free to discharge their international obligations through such organs or agencies as they may see fit to establish. If in the organization of the judiciary they choose to associate with the judge a jury with full discretion in determining the guilt or innocence of the accused, that discretion cannot be justly pleaded as a bar to an international claim when the discretion has been notoriously abused and has resulted in manifest injustice to the national of the state making the claim.

¹ *International Law*, 2nd Ed., Pt. 1, p. 327.

VISCOUNT FINLAY OF NAIRN

THE death of Viscount Finlay removes the most prominent of our noted international lawyers.

It was only after he had attained to a great position at the bar that he came in touch with international questions. In 1895 Mr. Finlay, as he then was, was appointed by Lord Salisbury to be Solicitor-General in the Administration which was formed after the general election of that year. For five years as Solicitor-General and for a further five years as Attorney-General, he was responsible as one of the Law Officers of the Crown for advising the Government on all the more important questions of law, including questions of international law, with which they were confronted.

Those were days when the machinery of government was less elaborate than it has become since the war, and when a higher proportion of the legal questions in the Government departments were submitted to the Law Officers for consideration and advice. It was also a decade when events of great moment were in progress and when questions of international law both novel and far-reaching were constantly arising.

At the beginning of the period the French military expedition to Madagascar was resulting in the French occupation of the island and its subsequent conversion into a French colony. In South Africa the tug-of-war between Briton and Boer was already beginning with its series of attempts on the part of the South African Republic to evade the obligations embodied in the Convention of 1884. In 1898 came the war between Spain and the United States. In 1899 there was the outbreak of hostilities in South Africa, followed by the prolonged period of tension with neutral Powers produced by some of the early episodes of that struggle, such as the capture of the *Bundesrath*. In the autumn of 1902 there came the blockade of the coast of Venezuela by the combined forces of Great Britain, Germany, and Italy; and in 1904 war broke out between Russia and Japan.

Then for the first time since the Napoleonic wars there began a struggle in which sea-power played an important part. Captures of neutral vessels were being made for the purpose of imposing economic pressure upon the adversary. The traders of this country were for the first time to experience the losses which belligerent

captures at sea impose on neutrals. Experience was showing the strength and the weakness of the naval arm for imposing economic pressure upon an enemy. It was proving also the difficulty of adjusting the rules of capture laid down in earlier days to the conditions in which commerce is carried on in modern times, and of restraining the resentment of the neutral trader when the treatment he suffered was not precisely in accord with that laid down in the text-books.

There were incidents, too, in the war which tried the patience of the country sorely. A P. & O. liner, the *Malacca*, on her way to China was captured by two Russian vessels which had passed the Dardanelles as merchant ships and then converted themselves into men-of-war when out at sea, and the ships of the Russian fleet had fired into British trawlers fishing on the Dogger Bank under the delusion that Japanese torpedo boats were lurking among them.

The Law Officers of the Crown are faced with a heavy responsibility at such moments. It was the good fortune of the country that it possessed at the time in its Attorney-General a man who combined a capacity for measuring calmly the strength of the conflicting considerations with the industry to explore the authorities, whether old or new, and the intuition to discern and to ignore the elements which in modern conditions had ceased to be of importance.

It was not, however, only in the problems on which he was called upon to advise the great departments of state that Sir R. Finlay was brought into close contact with international law. His years of service as a Law Officer were a time when international arbitrations were much to the fore. In 1903 he appeared as leading counsel on behalf of Canada and Great Britain in the Alaska Boundary Arbitration. However much Canada may have been dissatisfied with the award of the members of the Tribunal, she had no fault to find with the presentation of her case by the Attorney-General. As the Canadian Agent reported after the conclusion of the hearings: "We are much indebted to Sir R. Finlay for his opening argument, which in dignity, clearness, and mastery of detail was in every respect worthy of the important character of the issues involved."

A few months later Sir R. Finlay appeared at The Hague to argue on behalf of Great Britain before the Permanent Court of Arbitration the claim of the three Powers which had blockaded the coast of Venezuela to a priority over the other Powers in the

settlement of their claims against Venezuela. His argument was successful; the Tribunal gave a unanimous award in favour of the three Powers.

In 1910—when Sir R. Finlay had ceased to be Attorney-General—there came what may well be regarded as the forensic triumph of his life, his opening speech on behalf of Canada in the North Atlantic Fisheries Arbitration before the same tribunal. In a luminous argument, which lasted through sixteen sittings of the tribunal and was spread over a fortnight, he presented and developed the case put forward on behalf of Canada and Newfoundland, just as a month later Mr. Root—who as Secretary of State had arranged for this century-old dispute between the two English-speaking peoples about the Newfoundland fisheries to be referred to arbitration—in a speech of almost equal duration, presented the case on behalf of the United States. It was a great legal battle conducted with skill and vigour on either side. The result justified the efforts which were made, for the award not only settled the dispute; it eliminated the constant friction which had previously existed between the fishing interests of the two countries and restored harmony between the parties concerned.

In 1916 Sir R. Finlay became Lord Chancellor and was raised to the peerage as Baron Finlay. He held that office until the close of the war, and was made a Viscount when he retired from the woolsack. As Lord Chancellor he presided on occasions in the Judicial Committee of the Privy Council at a time when its rôle as the supreme court of appeal in matters of prize was of great importance.

It is no wonder that when such unusual experience of international questions was coupled with the great position which he occupied as an ex-Lord Chancellor, Lord Finlay should be invited to be a candidate in 1921 for the newly founded Permanent Court of International Justice at The Hague. Nor is it surprising that when prevailed upon to do so, he was among those who were elected on the first ballot at the Second Assembly of the League of Nations at Geneva.

Apart from his many and great legal qualifications for international work, he possessed what is rare among the lawyers of this country, a knowledge of languages. In the days when he was a medical student in Germany he acquired a mastery of German, and to the end he could recite with fluency and dignity passages from Goethe. French and other languages came later. It was the knowledge of these which enabled him to study the writings of the

great international publicists himself without being dependent upon translations or on the labours of others.

Of his work at The Hague no one is more qualified to speak than the President of the Court, who gave an eloquent and feeling address at the opening of the current session which is reproduced *in extenso*.

C. J. B. H.

Tribute paid to Lord Finlay by M. Anzilotti, President of the Permanent Court of International Justice, at the opening of the Fifteenth Session of the Court on Wednesday, May 15th, 1929.

In opening the Fifteenth Extraordinary Session of the Court I have a painful duty to fulfil.

Only a few months have passed since the day when in this very hall on a similar occasion I had to express the sad loss inflicted on the Court by the death of its Vice-President, André Weiss. And now yet another is missing from amongst us. The Right Honourable Viscount Finlay, in age the senior member of the Court, the most beloved and the most respected of its judges, died in London on Saturday, March 10 last, as the result of an operation which he had insisted on undergoing so that he might be able to continue to work amongst us.

The office of judge of the Permanent Court of International Justice was for our lamented colleague the crowning point of a long life during which he had successively occupied in his own country the highest positions to which a jurist can aspire. Others better qualified than I have already spoken, or will speak, of this, by far the widest field of his activities, of the services rendered to the administration of justice and to his country, of the authority and prestige acquired by his high intellectual and moral qualities. It is for the Court in whose name I have the honour to speak to declare that the sacred trust conferred on us—which was for our departed colleague the highest fulfilment of his mission in this world—has never been exercised with purer or nobler motives, with a greater spirit of devotion, or a greater consciousness of responsibility than by him.

Many of those who hear me have themselves been in a position to observe the assiduity with which our regretted colleague took part in the work of the Court. During his seven years of office he only missed one single session out of the fifteen that were held, and that on account of serious illness. May I add that he was always ready to answer any call, whatever the inconveniences occasioned or sacrifices necessitated thereby for him. "The Court first" was

his motto, and to that motto he remained faithful to the last moments of his life. In a letter, the last which he wrote me, on January 19, from Malaga, whither he had gone for his health, he spoke of his approaching departure for London and his decision to place himself on his arrival in the hands of oculists, in order to undergo the operation which was to enable him to begin reading again and thus to sit with us at the Session which, alas! is opening deprived of his presence.

What I have just referred to shows the manner in which Lord Finlay conceived of his duties as judge of this Court. Those duties, moreover, he had only undertaken after much hesitation and with full knowledge of the difficulties accompanying them and the heavy responsibilities which they involve. I learnt this from his own lips much later, and I do not consider that I am committing any breach of confidence in mentioning it. Although for certain personal reasons he would have wished to be elected to the Court, he hesitated long before consenting to become a candidate; and it was not his great age—he was then nearly eighty—which made him so hesitate; those who knew him have observed that age played practically no part in his decisions, to such an extent were intellectual and moral vigour combined in him with an almost marvellous physical energy. If he hesitated, it was that the responsibilities to be assumed by him in taking part in the earliest steps of the new institution seemed to him very serious, and because he feared he had not the qualifications necessary ably to fulfil his duties. Happily for the Court, that hesitation was overcome, and there remained of it no trace save the lively and profound consciousness of the duties which he had undertaken in accepting.

That hesitation is the more significant and worthy of mention in that, in reality, it would not be easy to find a man possessing the qualifications necessary for sitting on this Court to a greater extent than Lord Finlay. It is only too true to say that often a choice has to be made between persons whose judicial experience has been in municipal courts and who have not had an opportunity for profound study and application of International Law, and persons who, having devoted themselves to the study of International Law, have no experience of judicial duties. Such, however, was not the case with Lord Finlay, who, while holding the highest judicial offices in his country, had also to study and to apply International Law. The ten years during which he was a Law Officer gave him many occasions for applying the principles of

International Law to particular cases: this is easily realized when we consider that Lord Finlay had been Solicitor-General during the Spanish-American War and Attorney-General during the South African and Russo-Japanese Wars, the latter war having given rise to the celebrated Dogger Bank incident.¹ To this must be added the fact, specially to be noted, that he had been entrusted with the defence of his country's interests in certain international arbitrations which are amongst the most remarkable of our time, such as those relating to the Alaska Boundaries, the Venezuelan claims, the Frontiers of British Guiana, and the North American Fisheries.

In the same connexion, two other qualities must be mentioned which made Lord Finlay specially suited to sit on this Court. One of these was his knowledge of languages; if his mother tongue alone was familiar in the strict sense of the word, he could, however, not only read and understand but also speak German and French; further, he had a knowledge of Italian and Spanish more than sufficient to read and appreciate even the most difficult authors who have written in those languages. The other quality to which I feel that I must here refer, for I think that it contributed much towards enabling him to acquire and maintain to a very advanced age that broadness and suppleness of mind so necessary to understanding international questions, difficult and complex as they, if any, are—the other quality was his classical and literary culture. I still remember vividly the impression made on me when, a few months after making his acquaintance, I heard him repeat fluently and by heart long passages of Homer and of Virgil, or when, as sole response to certain arguments put forward in the Court during a discussion in which he had not taken part, he quoted to me without a single mistake certain remarkably appropriate lines of the *Divina Commedia*.

A man so highly qualified and enjoying a prestige afforded by a life without blemish or reproach, and by the very eminent position attained by him in his country—a prestige to which his age, greater than the average age of his colleagues, added almost a halo—could not fail to have in the Court a great authority. This authority impressed itself from the very outset and never diminished. The opinion of Lord Finlay was always, in the eyes of his colleagues,

¹ It may be remembered that that incident gave rise to most interesting questions in the domain of war and neutrality; this was the first occasion that the system of "Commissions of Enquiry" which had been established by the First Hague Conference, was made use of.

without exception, of the greatest weight; one was pleased to find oneself in agreement with him; if one did not agree, one required time for reflection. And without any doubt the members of this Court would have been happy to give him some more striking external mark of their confidence, if this had not been constantly and definitely refused by him.

This confidence was based not only on the value and intellectual qualities of the man, but also on his moral qualities, which placed him above any other considerations than impartiality and justice. I think I am paying the greatest tribute to our lamented colleague—and I am glad if I may at the same time correct erroneous opinions which appear from time to time in the press with regard to this Court—by saying here publicly that Lord Finlay did not hesitate to vote against the views put forward by his Government's representatives when he was convinced that right lay on the other side. And I desire to add, in order to give special emphasis to this fact, that on those occasions—two at least—opinions were divided in the Court; I remember for instance that on one of the occasions to which I refer, I, with other judges, voted in favour of the British Government's contentions, whereas Lord Finlay voted against. That shows that the question was certainly open to discussion and that the opinion of our lamented colleague was determined only by a fixed desire to render justice, by a mind superior to any national egoism.

In truth no one understood better than Lord Finlay that he was not here to represent his great country but to render justice and nothing but justice. What Lord Finlay truly represented in this Court, as it was his duty to do, was the legal system in which he was brought up. It is, in particular, thanks to him that certain principles and institutions of Anglo-Saxon Law, particularly as regards procedure, which seem best destined to meet the requirements of international justice, have, with the appropriate limitations and modifications, found a place in the Rules of Court. And there is no need to add that, in the course of the sometimes difficult tasks which we have to fulfil, he never failed to help us with those ideas of flexibility and of equity which are the basis and almost the life-breath of the English legal system, and which in certain respects are so well suited to fill the gaps and make good the imperfections that exist in international law.

If, on the one hand, the influence which the Anglo-Saxon legal system has justly exercised on our work is mainly due to Lord Finlay, on the other hand, the undisputed authority of our

departed colleague in the countries that make use of that system contributed much to enhance the prestige of the Court in those countries, at the moment when that prestige was most necessary. That is a great debt of gratitude which our Institution owes to the illustrious member of the earliest hour; may that debt never be forgotten.

As regards ourselves, who have had the rare privilege of working with him in the great task of promoting international justice, we shall consider it as a sacred duty to pay to his memory our tribute of veneration and affection. Veneration and affection—are not these the feelings inspired by the colleague and friend we have just lost? I could with difficulty say whether in the feelings inspired by Lord Finlay the veneration was greater than the affection or the affection greater than the veneration. It is perhaps because he inspired them both to the same degree: veneration because of his superior intelligence, his eminence of character, his absolute devotion to duty, his uprightness which never failed; affection because of his great kindness, his constant benevolence, his incapacity for any ill-feeling or animosity, his perfect loyalty and cordiality of manner. The man in whom these qualities are united to a degree of perfection rarely attained by others will always live in the thoughts of those who knew him; his loss will be for all time a cause of the profoundest regret.

LORD PHILLIMORE.

THE death of Lord Phillimore, following closely on that of Lord Finlay, has taken from us the last survivor of the great school of international lawyers who were brought up in the invigorating doctrines of the middle, and greater, years of Victorian development. A poet, the Latin proverb tells us, is born and not made. Lord Phillimore, however, was both born and made an international lawyer. He was born the son of a father who was at once the author of one of the three or four standard English text-books of International Law and the holder of the judicial office—the Admiralty judgeship—in which the call for the application of its principles is most frequent; he was made an international lawyer both by careful application, developing the natural bent of his genius, and by the great opportunities which were open to him, in particular during the later years of the war and the period of the birth of the League of Nations.

The leading facts of his career may be briefly told. He was born in 1845; after early scholastic successes at Westminster and Oxford, at the age of twenty-two he was elected to a fellowship at All Souls; from 1868 to 1897 he had a successful but not strikingly brilliant career at the Bar, his ordinary practice being mainly in the Admiralty Court, but much of his reputation coming from ecclesiastical cases, in which he appeared, in accordance with his deep conviction, on the High Church side; in 1897 he was made a judge of the High Court by Lord Halsbury (his promotion giving occasion for a cartoon highly complimentary to himself by Mr. Theo Mathew); in 1913 he was raised to the Court of Appeal; in 1916 he retired from the Bench but was shortly after raised to the peerage; in virtue of the high judicial office which he had held, he continued for the rest of his life to take an active part in the judicial work of the House of Lords and the Privy Council. He died, in his eighty-fourth year, on March 13, 1929. During his middle life he twice unsuccessfully contested a parliamentary constituency as a Liberal and a devoted supporter of Mr. Gladstone, to whom he was attached not only by political sympathy but also by an old-standing family friendship and a community of religious conviction.

His interest in International Law was unceasing through his long and active life. He edited his father's book, he presided at all, or nearly all, the meetings of the International Law Association in the present century; in his later years he became a member of the Governing Body of the Hague Academy of International Law; he was one of the mainstays of the Grotius Society. His high character, the dignity and courtesy of his manner, lent prestige to the ideals of peace and reason of which he made himself, perhaps somewhat on traditional lines, the exponent and the advocate. All this, however, represents only what other men, less gifted, might have achieved. When those who had the privilege of his personal friendship have passed away, his claim to the remembrance of posterity will be based, not on these generalities, but on the part which he played in the formation of the Covenant of the League of Nations and the foundation of the Permanent Court of International Justice. His profound knowledge of the accepted rules and precedents of International Law, the quickness of a mind which age ripened but did not enfeeble, the power of reasoning rapidly and accurately from principles which were accepted as beyond challenge, the moderation in action of a personality inspired by a high ideal, combined to make him the best qualified

of counsellors for the institution of the greatest of international instruments.

As between the Covenant and the Statute of the Court, Lord Phillimore's more valuable contribution was perhaps that which he made to the Statute. Historians of the Covenant give full recognition to his work, and the "Phillimore Draft" has its assured place in the records of the early stages of the formation of the League, but perhaps his most characteristic and successful work is to be found in the Statute of the Permanent Court, and in particular in the ingenious settlement (believed to be the joint work of Mr. Root and himself) of the thorny question of the election of the judges—a difficulty which had reduced almost to impotence the previous attempts at the establishment of a truly permanent international tribunal. In the necessity for the development of the power of that Court he was a firm believer; it was a matter of regret to him that political conditions in 1920 did not admit a general adhesion to the principle of compulsory arbitration in the last resort for international disputes as to legal rights; he felt, and expressed publicly, some disappointment at what he thought was an over-cautious decision in the Eastern Carelia case—for in his own case caution was the result of self-discipline rather than of temperament—and perhaps one point on which a biographer might hesitate to pronounce him *felix opportunitate mortis* is that the more general adoption of the so-called "Optional Clause", to which we may perhaps look forward in a not very remote future, did not happen within the compass of his life.

There is indeed perhaps something of a paradox in the Tacitean phrase; the ideas of death and felicity—at any rate for the survivors—go ill together. But if the phrase may have its truth for Lord Phillimore, that truth lies specially in the private and domestic aspect of his death, following as it did by a few weeks only the death of the wife with whom he had shared for more than fifty-eight years a life of singular and mutual happiness. From the public point of view, his death, at a time when International Law needs all the force which busy men can lend to it, is an unalleviated misfortune. And, as a writer in *The Times* well remarked at the time of Lord Phillimore's death, his long life had in it this peculiarity, that, in contrast to the more usual sequence of events, his best work was done in its latest years. His career as an advocate had been marked by competence rather than by genius: as a judge of first instance he was less successful than many men of smaller parts and less wide knowledge. His greater reputation in the sphere of

municipal law was won in the Court of Appeal, and more particularly in the House of Lords and the Judicial Committee of the Privy Council. Nor must we forget the services which during the war he rendered to his country—and perhaps no one but he could have rendered them—on the Naval Prize Tribunal.

The Naval Prize Tribunal was constituted under the Naval Prize Act of 1918, and consisted of Lord Phillimore (Chairman), Sir Guy Fleetwood Wilson, and Admiral of the Fleet Sir George Callaghan; on the death of the latter, Admiral of the Fleet Sir Doveton Sturdee succeeded him. The task of the Tribunal was one of great magnitude and complexity. Its work consisted in reviewing the circumstances of every seizure made throughout the war which had been followed by a decree of condemnation, and in deciding whether the proceeds did or did not fall to the Naval Prize Fund as being Droits of the Crown or as falling within one of the supplementary categories of the Act. In nearly all the cases the Court was unanimous and the judgments were delivered by Lord Phillimore. In the first of these, *The Abonema* (3 B. & C. P.C. 302) Lord Phillimore in a very able judgment discussed at length the history of the distinction between Droits of the Crown and Droits of Admiralty, and laid down general principles on which the Tribunal proceeded. The work of the Tribunal was heavy, as, besides many informal meetings, it held thirty-five sittings, of which ten were held in open court.

Thus it was that when the work of international construction and reconstruction had to be done, Lord Phillimore had both long judicial experience and a fund of legal scholarship, those two essential qualifications for success as an international lawyer which are rarely combined in one man so successfully as in Lord Phillimore.

For a man of so many scholarly interests, Lord Phillimore wrote but little. Apart from the revision of his father's standard work, he published only the book *Three Centuries of Treaties of Peace and their Teaching*, which appeared in 1917, and occasional articles, especially in the later years of his life, in this *Year Book* and other periodical literature. As with most English judges of distinction, his activities were necessarily directed rather to the more practical daily work of legal evolution than to the construction of any architectonic theory; in Lord Phillimore's case this is certainly a matter of regret, for many of his judgments in the House of Lords show a sense of style and form which, if his life had run on other lines, would have enriched legal literature.

All movements for the improvement of legal education found in him an active and highly equipped supporter. Himself a civilian from the schoolroom, if not from the cradle, he was always ready to insist on the necessity for English lawyers of a more general knowledge of Roman Law: he had small respect for that smattering which the generation now in middle life used to acquire for the Bar examination by the study of the excellent manual familiarly known as the "Small Hunter".

In the management of his life Lord Phillimore was singularly successful. To the last he retained a youthful and unruffled appearance; lunching at the Athenaeum even last year, he might have been taken for one of the younger members of the club. And this young appearance was the outward and visible sign of a naturally young temperament, a temperament which now and again came out in his judicial work and even in some of his views on International Law. He was never idle, but he was rarely or never overworked: even in his later years, when he might well have refused the smaller work of an international lawyer, he was ready to lecture at The Hague Academy of International Law, and he wrote himself most of the accounts of the meetings of the International Law Association and of the Institute of International Law which have appeared in recent years in *The Times*. He was elected an Associate of the Institute in 1920 and a Member in 1922. Nor can the writer of these lines omit to speak of the kindness and sympathy which he extended to the work of younger men, even when views were expressed which he was not inclined to share. He leaves behind him the memory of a grave courtesy, a hopeful outlook, a sincere character, an acute intellect, and a strong religious faith—all devoted soberly and cautiously to the furtherance of international justice and peace; of such qualities the contemporary world can ill support the disappearance. J. F. W.

SIR JOHN PAGET MELLOR.

SIR JOHN PAGET MELLOR, Bart., K.C.B., was the eldest son of the Right Hon. J. W. Mellor, K.C., some time Chairman of Committees in the House of Commons, and grandson of Mr. Justice Mellor who tried Arthur Orton, the Tichborne claimant. He was born on March 13, 1862, and died on February 4, 1929. He was educated at Cheltenham and Trinity Hall, Cambridge, and was called to the Bar of the Inner Temple in 1886. In 1894 he was appointed Assistant Solicitor to the Treasury and in 1909 he

succeeded Lord Desart, who had recently presided over the Naval Conference of London, as head of the Department. It is the most important legal department of the State; the head is not only Treasury Solicitor, but also Solicitor to the Admiralty, to the War Office, and to the Office of Works. He is also H.M. Procurator-General, and as such is responsible for preparing the case for the Crown in all cases of Prize. He is also the King's Proctor with special functions in divorce proceedings.

It is, however, of Sir John Mellor as Procurator-General that we propose to write, and particularly of the work which he accomplished during the war of 1914-18.

It was said in an intimate short memoir in *The Times* that "scanty recognition is awarded to those public servants whose work, incessant and exhausting, commands no popular appeal". Such was the work of Sir John Mellor. When the war broke out, a new set of Rules for the Prize Court, more in keeping with modern methods of litigation than the old practice, had already been prepared and was ready to be brought into operation, but of the practical workings of Prize Law there was no one who could speak from experience. The Prize Court had last sat during the Crimean War. Sir John Mellor was faced with the difficulty of obtaining the staff necessary for his work in prize at a time when it was growing in other directions. In a remarkably short space of time the men were found both for the office at Whitehall and also for the branch at the Law Courts which was concerned with the actual litigation.

The preparation of the cases to come before the Court and the examination of claims for release of ships or cargoes seized in prize were the work of the department of H.M. Procurator-General. His work was not limited to that of the English Prize Court; forty-one Prize Courts with similar Commissions to that of the Court sitting in London were established in the Dominions, Colonies, and Territories under the Government of India. Courts were also erected in Egypt, Zanzibar, and Cyprus. From all these courts there was an appeal to the Judicial Committee of the Privy Council, and the Procurator-General was responsible for the preparation of the brief and for the conduct of these appeals. To assist the Procurators in these overseas courts he had various memoranda prepared, and his advice was constantly sought by them. As a result of this advice, in at least one important case, where the Procurator in one of the Dominions sought Sir John Mellor's aid, the Crown was saved the expenditure of a large sum

which its advisers deemed necessary for the successful conduct of the case, and an argument based on the opinion sent out by his department convinced the Court of the liability to condemnation of a valuable ship and cargo.

Prize Law received important developments during the course of the war, though all of them were in accordance with principles which had been established by Lord Stowell and applied by the courts of the United States during the Civil War. The preparation of the case of the *Kim*, which involved the application for the first time in an English Prize Court of the doctrine of Continuous Voyage or Ultimate Destination of Contraband, was the first of a long series of cases on the subject which called forth the skill and learning of the Procurator-General; it also earned the praise of Sir Samuel Evans, who tried the case. The arguments in support of the Retaliatory Orders in Council in the *Stigstad* and the *Leonora* involved considerable research into the historical aspects of the Orders in Council issued during the Napoleonic wars. The operations on the Great Lakes of Central Africa and in Mesopotamia involved the consideration of the extension of the jurisdiction of the Prize Court to captures effected on inland lakes and rivers, an extension which the Prize Court, following cases in the United States, accepted. Appeals from Alexandria raised important questions regarding the Suez Canal Convention, and there were numerous questions of interpretation of Hague Conventions.

To enumerate the various questions which required most careful consideration both in regard to the Law of Prize and in reference to the so-called "blockade" measures under the Retaliatory Orders in Council, would be to write the history of Prize Law during the war, but the work of Sir John Mellor can only be fully appreciated when the whole mass of the Prize cases is studied. Besides these cases, he was also responsible for preparing those which came before the Naval Prize Tribunal which was established to allocate the amounts derived from the condemnation of prizes between the Exchequer and the Naval Prize Fund. This Tribunal, over which the late Lord Phillimore presided, dealt with the proceeds of condemnations ordered in 2,312 Prize cases, allocating to the Naval Prize Fund more than fifteen million pounds and to the Exchequer not less than eight million pounds.

All this was only a portion of the work which Sir John Mellor undertook during those strenuous years from 1914 till his resignation in 1922. The creation of the Munitions Department in 1915, for which he acted as Solicitor, brought a vast increase of work

into the Department. During the whole of the time his genial personality, unfailing patience and courtesy, and his kindly interest in all his staff, combined with an innate modesty and desire that all who were working with him should receive the credit for what they did, produced in his Department the spirit of a "band of brothers", and a personal affection which is rarely inspired by the official relations maintained in Government Departments. He never spared himself, but always, under most trying conditions, even when bearing the heavy burden of anxiety for his sons, one of whom was a prisoner in the hands of the Turks and the other an officer with Allenby who contracted a fatal disease in the service of his country, did his work with the thoroughness, efficiency, and courtesy characteristic of the highest type of civil servant of the Crown.

A. PEARCE HIGGINS.

DR. H. H. L. BELLOT.

DR. HUGH HALE BELLOT, who had been a member of the Editorial Committee of the *Year Book* since 1925, died suddenly on August 11, 1928, while attending the meeting of the International Law Association at Warsaw. He was born on October 19, 1860, and was educated at Leamington and Trinity College, Oxford, taking the degree of D.C.L. in 1907. He was called to the Bar as a member of the Inner Temple in 1890, and for a time was engaged in the general practice of the law. He published several works on special branches of English Law: *Bargains with Money-lenders* (1906), *The Miner's Guide* (1908) in collaboration with Judge Atherley Jones, K.C., *The Pharmacy Acts* (1908), *The Law of Children and Young Persons* (1909) in collaboration with Judge Atherley Jones. He was, however, more attracted to the study of Constitutional and International Law, and his first publication was a volume on *Ireland and Canada, Studies in Constitutional Law and History* (1893). In collaboration with Judge Atherley Jones, he wrote an important work on *Commerce in War*, which was published in 1906.

During the war of 1914-18, in which he lost a son, Dr. Bellot paid special attention to the laws of war, and when the Grotius Society was founded, in 1915, he was appointed one of the Honorary Secretaries, and threw himself heartily into the work of this Society, of which in 1921 he became sole Honorary Secretary. He edited the annual volumes published by the Society, containing papers read at its meetings, and contributed to these volumes. The

success of this Society is in no small measure due to his enthusiasm. In 1918 the Attorney-General (Sir F. E. Smith) appointed a committee to consider the question of breaches of the laws of war. The work of this body, which was presided over by the late Sir John Macdonell, was very heavy and involved a great deal of careful inquiry. Bellot was appointed its Secretary, and on him fell a large part of these labours. The International Law Association resumed its meetings after the war, in 1920, at Portsmouth, and Bellot, who had been appointed one of the General Secretaries in 1915, was indefatigable in ensuring its success; it was in connexion with the work of the Association that he became most widely known. The arrangements for its meetings, which were held in various countries, the work of its numerous committees, and the preparation of reports occupied much of his time, and to these labours he gave himself unsparingly. He was an examiner in Roman Law, Jurisprudence, and International Law in the University of London; he was also appointed acting Professor of Constitutional Law in the same University during the absence on war service of Professor J. H. Morgan. Bellot was elected an Associate of the Institute of International Law in 1921 and a Member in 1927. His chief contributions to the science of International Law, apart from his share in *Commerce and War* (above mentioned), are to be found in numerous contributions of papers to the International Law Association, the Grotius Society, and to various English and continental legal journals. In last year's *Year Book* he wrote a weighty criticism of the decision in the *Fagernes* case, relating to the territorial limits of the Bristol Channel. In 1921 he published a volume on *The Supreme Court of the United States and the Permanent Court of The Hague*, and in 1922-4 he brought out a new edition of Pitt Cobbett's *Leading Cases in International Law*. In 1924 he was invited to lecture at The Hague Academy of International Law on *La Théorie anglo-saxonne des Conflits des Lois*; these lectures are published in the *Recueil des Cours* for that year (Vol. II). He also published an edition of Foote's *Private International Law* (1925). He was a *collaborateur* of the *Journal de Droit International* and London correspondent of the *Institut Intermédiaire International*.

Bellot was a man of very definite opinions and an uncompromising opponent of the doctrine of the absolute sovereignty of the state. He believed that all states were subject to the Law of Nations, and he consequently recurred to the problem created by superior orders which violated the laws of war. The project which

he had very much at heart was connected with this subject, namely, the establishment of an International Criminal Court, a draft statute for which was prepared by him and finally adopted at the meeting of the International Law Association at Vienna in 1926. He was of a modest and retiring disposition, but his kindly nature attracted a large circle of friends who lament his sudden and unexpected death.

A. PEARCE HIGGINS.

SIR GEOFFREY BUTLER.

THE death of Sir Geoffrey Butler, K.B.E., M.P. for the University of Cambridge, on May 2, 1929, at the early age of forty-one, removes one who had done much to further a good understanding between nations, particularly between Great Britain and the United States, and who, by his teaching at Cambridge and by his published works, has left a permanent record of valuable contributions to the historical development of the Law of Nations. Debarred by physical causes from taking an active part in military operations during the war of 1914-18, Sir Geoffrey rendered valuable assistance in the Foreign Office and in the United States. When the war was over he directed his attention to a study of the Covenant of the League of Nations, and in 1919 published a *Handbook of the League of Nations*, to which Lord Robert Cecil contributed an introduction. A second edition appeared in 1925, and the book has been translated into Finnish. For some years past, as Fellow and Lecturer of Corpus Christi College, Cambridge, he lectured on the history of international relations, and the development of International Law, chiefly from the diplomatic point of view. At the end of 1928, in collaboration with Mr. S. Maccoby, a former Scholar of his College and a Whewell Scholar in International Law in the University, he published an important work on *The Development of International Law*, in which the growth of International Law was shown as an expression of the changes in the state system of the world. A somewhat novel method of treatment was adopted in dividing the history into periods which the authors held to be under the domination of a guiding principle, and though opinions may differ as to the value of the division, the result is the most valuable contribution to the history of International Law that has been made by an English-speaking author during this century. Sir Geoffrey contributed an article on *Sovereignty and the League of Nations* to the first volume of this *Year Book*, in the success of which he was much interested.

Of his personal attraction, and of his work in other spheres, both of practical politics and historical research, this is not the place to speak. He had been Conservative member for the University of Cambridge since 1922, and Private Secretary to the Secretary of State for Air since 1925, but, although a strong party man, his political outlook was broad, and his speeches in the House of Commons on questions of foreign policy were characterized by moderation and a capacity for understanding points of view which were not his own. He won the respect and admiration of those who differed from him fundamentally. His death leaves a gap in the ranks of students of the history of International Law and Diplomacy which it will be very difficult to fill.

A. PEARCE HIGGINS.

NOTES

SOME IMPLICATIONS OF THE PACT OF PARIS

(1) THERE are two important general considerations which tend to receive less prominence than they deserve in discussions of the significance of the Pact of Paris. The first is that, whilst almost all discussion has centred around Article 1,¹ providing for the renunciation of war "as an instrument of national policy", Article 2,² properly understood, contains a solution of most of the doubts and difficulties raised by Article 1. The second is that the Pact is not an isolated event. The criticism which regards it as no more than a pious aspiration would be justified if in 1919 we had been given this Pact *instead of* the Covenant of the League. But the date of the Pact is 1928, and it has been born, not into a wholly unorganized world society, but into one in which the foundations of peace—so far as peace is a matter of organization, as it is to an extent greater than we sometimes realize—are already well and truly laid. The structure of peace is obviously not being built to the plans of a single architect, but there is only one site, and the buildings on it are connected, despite the mixture of styles. To understand any part of it, we must examine its articulation with the other parts.

(2) Ever since 1919, states that are Members of the League have been bound to submit "any dispute likely to lead to a rupture" to one or other of the pacific modes of procedure mentioned in Article 12 of the Covenant, and a superficial critic might say that, for those states at any rate, Article 2 of the Pact, with its similar but less precise terms, leaves the position practically unchanged. In fact, the Pact introduces here two new elements. In the first place the Covenant, as is well known, did not in every event expressly preclude resort to war, provided that the prescribed pacific procedure had first been tried—there have existed hitherto the so-called "gaps" in the Covenant. The Pact now closes these. In the second place—and this is a change of far greater moment than the former, because the "gaps" have already been virtually closed by the Council's interpretation of its own function under Article XI—the Pact makes the seeking of a settlement of any dispute by other than pacific means the breach of an obligation *to the United States*. This is the legal aspect of the great political fact that the United States has now entered into the peace system which most of the rest of the world has been building during the last ten years.

(3) One of the commonest criticisms of the Pact is that, although the parties to it have renounced war as an instrument of their national policies, they have provided in it no means of distinguishing between the war which it forbids and the war undertaken in self-defence which it permits, and that indeed there stands as one of the accepted bases upon which the Pact is made Mr. Kellogg's notorious declaration that "every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and *it alone is competent to decide whether circumstances require recourse to war in self-defence*". But in

¹ D. H. Miller, *The Peace Pact of Paris*, p. 123, points out that during the year and a half of diplomatic discussion preceding the Pact there was hardly more than a casual reference to Article 2.

² "The High Contracting Parties agree that the settlement or solution of all disputes or conflicts, of whatever nature or of whatever origin they may be, which may arise between them, shall never be sought except by pacific means."

fact, as Professor Shotwell has pointed out,¹ the Pact, in Article 2, "defines aggression and defence without a definition". It is inconceivable that Mr. Kellogg meant to lay down that a state is competent to declare its recourse to war to be defensive in defiance of patent facts; and whether or not a state has been willing to seek a settlement by pacific means must necessarily be a fact patent to all. The point on which criticism has been concentrated concerns solely the interpretation of Article 1, but "if international disputes of whatever nature or of whatever origin they may be are settled by pacific means, then no possible point in the interpretation of Article 1 could ever arise".²

(4) The so-called British "Monroe" doctrine, asserted by Sir Austen Chamberlain in his Note of May 19, 1928, would go far to stultify our participation in the Pact if Article 1 stood alone: "There are certain regions of the world the welfare and integrity of which constitute a special and vital interest for our peace and safety. His Majesty's Government have been at pains to make it clear in the past that interference with these regions cannot be suffered. Their protection against attack is to the British Empire a measure of self-defence. It must be clearly understood that His Majesty's Government in Great Britain accept the new treaty upon the distinct understanding that it does not prejudice their freedom of action in this respect." But it is not a fair paraphrase of this declaration to say simply that we claim "freedom of action", meaning by that a general freedom from the obligations of the Pact, in the "certain regions" referred to. The claim is qualified; we claim "freedom of action *in this respect*", and the context shows that this means merely that we claim to treat an "attack" on these regions as an attack on ourselves; in other words, we claim to regard the regions referred to, though not part of the British Empire, as if they were part of it for the purpose of defence. If that is what the declaration means, then, like Mr. Kellogg's doctrine of self-defence, it is only vague and dangerous so long as we fix our attention on Article 1. No occasion for its operation can arise unless Article 2 has first been violated, and, as we have seen, all the world must know when that has occurred. Action under the doctrine would almost certainly be action to *enforce* the Pact.

(5) The Pact has been criticized for referring vaguely to "pacific means" of settlement, and doing nothing to create an organization for pacific settlement. It would have been superfluous to do so, for in this respect the Pact has been "implemented in advance".³ Such a criticism illustrates the vice of regarding the Pact without reference to the environment in which it must operate.

(6) The Pact contains no sanctions. Beyond the provision in the preamble "that any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty", it says nothing of what is to happen in the event of its terms being violated. But it is inconceivable that nothing should happen. If a state does an act which constitutes a breach of its treaty obligations to another, the latter does not necessarily go to war to enforce its treaty right. But it cannot be indifferent.⁴ So in

¹ *War as an Instrument of National Policy*, p. 212.

² Miller, u.s., p. 126.

³ Miller, u.s., p. 137.

⁴ This is admitted by Senator Borah: "Of course the Government of the United States must reserve the right to decide, in the first place, whether or not the treaty has been violated, and, second, what coercive measures it feels obliged to take. But it is quite inconceivable that this country would stand idly by in case of a grave breach of a multilateral treaty to which it is a party. . . . Of course, in such a crisis we would consult with the other signatories and take their judgment into account. But we should not bind ourselves in advance to accept their decision. . . . The effect of the Kellogg

the event of the Pact being broken by a state resorting to war as an instrument of its national policy—and we know from Article 2 that that means without having sought a settlement by pacific means—it is inconceivable that another state, being a party to the Pact, should declare itself neutral between the injuring and the injured state. Neutrality in the traditional sense, except perhaps in the unlikely event of both belligerents having violated the treaty, would only be conceivable on the assumption that the state violating the treaty could not be identified, and the immense importance of Article 2 is that for practical purposes it rules out this contingency.

Historically, as is well known, the modern law of neutrality was born of the difficulty, reluctantly accepted since the eighteenth century as insuperable, of distinguishing between the “just” and the “unjust” belligerent. That difficulty would still be insuperable if its solution depended on an instantaneous appraisal of *the merits* of a dispute, which may be infinitely complicated. It disappears when states are under obligation never to seek the solution of any dispute, *whatever the merits may be*, “except by pacific means”.

(7) For Great Britain the most immediate significance of the new outlook on the whole institution of neutrality, which the Pact seems to make inevitable is its bearing on the problem of the “freedom of the seas”.

Obviously a naval Power which should seek the settlement of a dispute in breach of its undertaking—that is to say, otherwise than by pacific means—must not expect to exercise the traditional, or indeed *any*, belligerent rights at sea against other Powers whose treaty rights it is itself violating, and an authoritative statement on behalf of Great Britain that we accept this consequence of the Pact might clear the air. Such a declaration would cost us nothing, for it would relate to a hypothetical event which we at least know cannot occur, *since Great Britain will not violate the Pact*. But it is an equally clear implication of the Pact that, if we or any other state should be involved in war by a breach of the Pact on the part of the other belligerent, there can be no neutral rights as against the innocent belligerent. That the Pact has supplied the key to the vexed problem of the “freedom of the seas” is already recognized by many of those who have given real thought to the matter.¹ The popular recognition, which is probably a condition of any conventional settlement of the question, is probably only a matter of time.

J. L. BRIERLY.

THE UNITED STATES AND THE PERMANENT COURT OF INTERNATIONAL JUSTICE

THERE will be unalloyed satisfaction, not only among all international lawyers, but among all who are sensitive to the currents prevalent in the international atmosphere, at the prospect of the removal of the difficulties which have hitherto been felt by the United States as obstacles to adhesion to the Protocol of Signature of the Permanent Court of International Justice. So long as the most powerful nation in the world was absent from the list of states which stand in proposal is a solemn pledge to let all this peace machinery (sc. the World Court, the League, Locarno) work.” Interview in *New York Times*, March 25, 1928, quoted by Shotwell, u.s., p. 218.

¹ Cf., e.g., Miller, u.s., p. 133; Shotwell, u.s., ch. XXI; the *Round Table* for March, 1928, p. 244; Lord Cecil and W. Arnold-Forster in the *Journal of the Royal Institute of International Affairs* for March 1928, p. 99.

a direct parental relation to the Court, the main conception with which the Court was instituted remained unrealized. The presence of an honoured judge of American nationality was an indication that American lawyers at any rate had no wish to hold aloof from the Court, but such participation remained personal and did not represent or imply a national attitude to a Court which is intended, by consent of the nations, to be the ultimate judicial authority for the whole civilized world.

The adhesion of the United States will be an event of such capital importance that it is superfluous and perhaps unstatesmanlike to examine with a legal microscope the exact terms of the Draft Protocol adopted on March 18 last by the Committee of Jurists at Geneva. The fact of agreement is the essential thing, and on this it may be permitted to a stranger to the negotiations to offer warm thanks and congratulations to all concerned, and especially to Mr. Elihu Root, who has thrown the whole reserve of the strength of his old age into the search for a successful issue, and to Sir Cecil Hurst. We may expect with confidence that the apprehensions felt in 1926, on both sides, as to an unreasonable use of possibilities legally remaining open, will prove vain in practice. Such apprehensions in fact are often rather a symptom of a contemporary psychology than a true anticipation of the future. In an atmosphere of common sense, legal rights are not exercised indiscriminately, and their very existence may come to be forgotten. It was always inconceivable that effect would not be given to any reasonable objection by the United States to refer a question to the Court for an advisory opinion, and it was also always inconceivable that if any objection by the United States were made on insufficient information, it would be persisted in after a full and confident exchange of views. Equally, it was impossible—and the United States made, it appears, no such demand—to abandon the whole system of advisory opinions, which has proved its utility and without which the Council of the League cannot properly discharge its functions under the Covenant (let the reader reflect on Article 15, paragraph 8). Nor was it opportune or possible to solve the vexed question whether unanimity in the Council—with or without reckoning any disputant Powers—is necessary for a reference for an advisory opinion.

We do not, therefore, propose to attempt any detailed examination of the text of the new Protocol: let us note only that by its first article the states signatory to the original Statute of the Court accept the special conditions for adherence laid down by the Senate of the United States in 1926, and let us wish it a successful passage, with the help of Mr. Root's authority, through the Senate, the deliberations of the Governments concerned, and the organs of the League at Geneva.

The recent appointment of Mr. C. E. Hughes—some time Secretary of State and only by the smallest margin of votes not President of the United States, not to speak of his presence on the Bench of the Supreme Court—to the seat on the Court vacated by Judge Moore may be expected to facilitate in some measure the acceptance by the Senate of the new Protocol, and at the same time to enhance the authority of the Court. The personality of the judges of the Court is a matter of the highest importance in the establishment of its authority. The judges must have something of the statesman as well as of the lawyer. So far as possible they should have not merely an academic but a practical acquaintance with legal problems, national and international, before appointment to the Bench. They

should be men whose names are either already, or are in a fair way to be become, of national or even of international reputation, so that the Court may gather round it that halo of prestige which men of personal authority have in the past given to great national tribunals, and that the general opinion of the world may be more easily disposed to accept decisions which come to it with the force of the judicial, and even the creative, personality of a Mansfield or a Marshall.

J. F. W.

THE MANDATE FOR TRANSJORDAN

AN agreement was made in February 1928, between His Britannic Majesty and the Emir of Transjordan, varying in important respects the execution of the Mandate for Transjordan which was conferred with the Mandate for Palestine in 1922. There was, indeed, no separate Mandate for Transjordan; but by a resolution of the Council of the League of Nations, passed in September 1922, at the suggestion of the British Government, certain provisions of the Mandate for Palestine were, in accordance with Article 25 of that Mandate, declared not applicable in the territory lying east of the Jordan and the Dead Sea. It was further provided in the application of the Mandate to Transjordan that the action which in Palestine is taken by the Administration of Palestine will be taken by the Administration of Transjordan under the general supervision of the Mandatory. A declaration by the British Government was approved to the effect that His Majesty's Government accepts full responsibility as Mandatory for Transjordan, and undertakes that such provision as may be made for the administration of that territory shall be in no way inconsistent with those provisions of the Mandate which are not declared inapplicable by the resolution. The provisions excepted were those dealing with the establishment of a Jewish National Home and the Holy Places.

In 1923 an announcement was made by the High Commissioner for Palestine that the British Government was prepared to recognize the existence of an independent Government in Transjordan under the rule of the Emir Abdullah (who had been administering the country since 1921 with British advisers), provided that the Government was constitutional and placed His Britannic Majesty in a position to fulfil his international obligations by means of an agreement to be concluded with the Emir. After five years that agreement has been concluded, and the Mandatory's obligations for Transjordan will now be satisfied in virtue of a treaty with an autonomous Government, as they have been, since 1922, in the mandated territory of Iraq. The form of constitution for Transjordan is contained in an Organic Law, which, however, has not yet come into force because it is a condition of its enactment that it must be approved by the Legislative Council of Transjordan that has only just been elected.

The agreement between His Britannic Majesty and the Emir follows the same broad lines as the agreement between His Majesty and the King of Iraq; but it is, on the one hand, a more comprehensive document, and, on the other, it gives a more express control to the British Government for the carrying out of its obligations towards the League of Nations. The difference may be due to the difference in the original mandates, for while the Mandate for Iraq contemplated the establishment of an autonomous Government, subject to British advisers, the Mandate for Palestine and Transjordan invests the Mandatory with "full powers of legislation and administration, save as they may be limited by the

terms of the Mandate". It was necessary, therefore, for the Mandatory to retain a general power of veto over all the legislation of Transjordan and of supervision over the administrative actions of the Government, in virtue of its obligations to the League of Nations.

The agreement provides that His Britannic Majesty shall be represented in Transjordan by a British Resident acting on behalf of the High Commissioner for Transjordan, who is, in fact, the same person as the High Commissioner for Palestine. The powers of legislation and administration entrusted to His Majesty as Mandatory are to be exercised by the Emir through a constitutional Government to be determined in an Organic Law; and the Emir agrees that all such laws as may be required for the full discharge of the international responsibilities of His Majesty shall be adopted, and that no laws shall be made in Transjordan which may hinder the full discharge of such international responsibilities and obligations.

The Emir will be guided by the advice of the British Representative in all matters concerning foreign relations, and in all important matters affecting the international and financial obligations and interests of His Majesty in respect of Transjordan. He will follow an administrative, financial, and fiscal policy which will ensure the stability and good organization of his Government and its finances; and he will not alter the system of control of the finances without consent. He will refer for the advice of His Majesty the annual budget law, any law which concerns matters covered by the provisions of the agreement, and any law touching matters specifically dealt with in the Mandate. He undertakes, also, that he will give effect to reasonable provisions which His Majesty may consider necessary in judicial matters to safeguard the interests of foreigners. The agreement to this effect is to be communicated to the Council of the League.

There is to be no Customs barrier between Palestine and Transjordan except by agreement between the two countries, and the Customs tariff in Transjordan is to be approved by His Majesty.

With regard to the maintenance of military forces, His Majesty may maintain such forces in Transjordan and may raise and organize in the territory forces necessary for the defence of the country. While in principle the cost of these forces is a charge on the revenue of Transjordan, until the revenues of that country are sufficient to meet the ordinary expenses of the administration, there will be a contribution from the British Treasury by way of a grant or loan in aid. Martial Law is only to be proclaimed on the advice of the British Representative, and any part of the country placed under Martial Law will be entrusted to the administration of an officer of His Majesty's Forces.

There has been a remarkably rapid development in the mandated territories of Iraq and Transjordan, in respect of both of which there was a war-time promise of the British Government to assist Arab autonomy, so that the countries have reached a point at which they may stand by themselves, subject to advice and assistance of the Mandatory. In the case of Transjordan, where the people are less developed than in Iraq, the advice and assistance will for the time being be of a comprehensive character.

N. B.

THE STATE OF THE CITY OF THE VATICAN

THE period since the termination of the war of 1914-18 has witnessed many revivals of ancient states, some of which had ceased to exist for centuries. On February 11, 1929, there was brought again into existence a state more ancient than Poland or any of the "succession" states. By a Treaty, Concordat, and Financial Convention, signed by the representatives of Italy and of the Holy See, Italy recognizes the full property, exclusive dominion, and sovereign jurisdiction of the Holy See over the City of the Vatican, whose boundaries are indicated on a map annexed to the treaty. There is a mutuality of recognition; the Pope recognizes the Kingdom of Italy under the dynasty of the House of Savoy, with Rome as the capital of the Italian State, and the King of Italy recognizes the "State of the City of the Vatican" under the sovereignty of the Sovereign Pontiff. The Pope has declared himself fully satisfied that under these agreements the Holy See possesses the guarantees necessary to provide due liberty and independence to the spiritual government of the Diocese of Rome and of the Catholic Church in Italy and the whole world. After a lapse of nearly fifty-nine years the "Roman Question" is thus definitely and irrevocably solved and eliminated.

From the time of Pépin and Charlemagne, Popes were looked upon as sovereign princes whose relations with other sovereign Powers were regulated by rules of International Law when and as they came into being. The area over which the Popes exercised their temporal sovereignty varied considerably, but until the conquest of the Papal States by the armies of the French Republic, in 1796, some part of Italy, Rome and the surrounding country, was held by the Popes, who considered the Papal States as a domain given to the Church to assure the complete independence of the Holy See. Such territory was considered to be inalienable, and Popes and Cardinals swore to maintain it intact. After its conquest in 1796 and the imprisonment of Pius VI, the Holy See was restored in 1800, and re-established by the Treaty of Vienna. Troublous times followed; revolution broke out in the Papal States, and Pius IX was restored to his throne by the joint arms of France, Austria, Spain, and the Two Sicilies; and between 1849 and 1870 there were, for the greater part of the time, French troops in occupation of Rome. Meantime the unification of Italy under Victor Emmanuel proceeded apace, and in 1868 and 1870 the Italian Government made overtures to the Pope for an agreement whereby he was left with the sovereignty of the Leonine City, with a population of about 15,000 persons. These overtures were rejected, and, the French troops having been withdrawn on the outbreak of the Franco-Prussian war, Italian troops entered Rome on September 20, 1870. A plebiscite of the Papal States was taken and complete annexation was effected on October 9. On May 13, 1871, the Italian Parliament passed the Law of Guarantees which, by the treaty of February 11, 1929, the Italian Government undertakes to repeal. This law was never accepted by the Pope, and, though under it £129,000 was annually allocated by the Italian Budget for the sacred Apostolic palaces, the Sacred College, and the diplomatic service of the Church, no Pope has availed himself of it. The Law of Guarantees was Italy's expression of the meaning of a "free church in a free state"; it had in no sense an international character. It recognized no right of territorial sovereignty of the Pope over any portion of the City of Rome, though it permitted him to have the full enjoyment of the

Vatican, the Lateran Palace, the gardens and dependencies, and the Castel-Gandolpho. The person of the Pope was recognized as inviolable, and attacks on him were punishable with the same penalties as those against the King. The Government of Italy under this law would render him the honours of a sovereign monarch, and he was allowed to keep his guards. The papal residence and places occupied by a Conclave or Council were guaranteed immunity, and the right of the Pope to send and receive diplomatic agents was recognized as well as his right of freedom of communication with the whole Catholic world. For this purpose he was allowed to have his own postal and telegraphic offices.

The Pope ceased to be a temporal sovereign when he ceased to have territory over which he could exercise temporal authority. His representative was refused admission to The Hague Peace Conference in 1899. Germany, in her draft of a Covenant of the League of Nations, expressly provided for the right of the Holy See to admission; on the other hand, by a secret arrangement of April 26, 1915, Great Britain, France, and Russia agreed to support Italy in excluding the Papal representative from the negotiations for peace. However, in May 1922, the Papal Secretary communicated to the Conference at Genoa a long memorandum on the religious question in Russia.¹

The Treaty of February 11, 1929, appears to be based on the Law of Guarantees, 1871, but with important modifications. Special provisions are made for the Pope's freedom of communication by land and air with the whole world through and over Italian territory. Immunities are granted to Papal officials in Italy who do not reside in the Vatican City, as well as for buildings in Rome necessary for papal administration. The right to send and receive diplomatic agents according to the general rules of International Law is specified, and the two High Contracting Parties bind themselves to establish normal diplomatic relations, the Apostolic Nuncio in Italy to be Doyen of the Corps Diplomatique according to the procedure laid down by the Congress of Vienna, 1815. This will displace the British Ambassador at Rome from his position as Doyen. The Vatican City is not to become an Alsatia for criminals, nor will those who commit crimes within the Vatican City escape punishment by flight to Rome or Italy. The Italian Government is to punish such criminals as escape from the Vatican City, and the Holy See will deliver to Italy persons who take refuge in the Vatican City accused of acts which are criminal by the laws of both states. Whether this means a special extradition treaty between the two parties or whether this provision is sufficient is not clear, but it evidently predicates a Criminal Code for the Vatican City. Italy undertakes to pay the Holy See for the loss of temporal power in 1870, 750 million lire (£8,152,000) in cash and 1,000 million lire (£10,869,000) in Italian State Bonds bearing interest at 5 per cent.

There is also a provision which may have an important bearing on the question whether the Pope will apply for admission to the League of Nations. It is declared by the Pope that the Holy See desires to remain and will remain extraneous to the temporal competitions between other states, as well as international conferences convened for this purpose, unless the parties in conflict appeal unanimously to its mission of peace, and reserves the right in any case to the exercise of its moral and spiritual power. In consequence thereof, the Vatican territory will always be considered neutral and inviolable.

By the joint agreement of the two Powers, Italy and the Holy See, the new

¹ P. Fauchille, *Droit International*, § 396(3).

state of the Vatican City is neutralized, and although this agreement cannot be said to place the Vatican in the same category of neutralized states as Switzerland, it nevertheless raises important questions as regards admission to the League. Switzerland, by the Treaty of Paris, 1815, confirmed by Article 435 of the Treaty of Versailles, 1919, was acknowledged by the contracting Powers to be perpetually neutral; consequently she is unable to take part in a war, her territory is inviolable, and she cannot allow even the passage of troops through her territory. Notwithstanding these facts, Switzerland was admitted to Membership of the League on these terms. The Swiss Government, however, recognized the duties of joint liability devolving upon her from her Membership, including the duty of participating in the commercial and financial measures demanded by the League against a state which violates the Covenant.¹ As to the eligibility of the Vatican State for election, that would be a matter to be determined by a vote of the Assembly, but, having regard to the difficulties raised by Switzerland, it is a question whether the incapacity of the Holy See to take any part in enforcing the decrees of the Assembly against a recalcitrant Member would not be felt to be an insuperable objection.² There is also the further point that the Members of the League might refuse on the ground that by the Pope's admission Italy would have a double representation. The Holy See expressly states that it desires to remain outside the temporal competition of states, with which the League is in a large measure concerned. It is true that much of the work is in the nature of international co-operation for the promotion of humanitarian and civilizing objects. There may well be certain of these which the Pope would wish to assist, but, as in the case of the United States, he might find that his influence could be equally well exerted by means of an "observer". The Pope's claim to world-wide recognition lies not in his exercising a temporal sovereignty over a few acres of land and a handful of subjects, but as being the earthly head of a Church which was an ancient, world-wide institution before any of the states which compose the League of Nations were in existence, and as being accepted as a Sovereign Pontiff by its members.

We are not concerned with the Concordat regulating the status of the Church and the state in Italy, its terms are evidently greatly to the satisfaction of the Holy See, but the favour with which the Pope now regards the Italian nation as a faithful child of the Church may not be without an international repercussion as regards the protection of Catholic missions in non-Catholic countries, particularly in the East, a protection which France has in the past gloried in exercising. Spain's position as the leading Catholic state is certainly jeopardized by the *rapprochement* between the Vatican and the Quirinal, and Italy's position has been immensely increased.

Apart from the possibility of the Pope applying for admission to the League of Nations, there arises the question of the recognition by other states of the altered position of the Papacy. Will the various Powers now represented at the Vatican consider it necessary to make any change in their methods of accrediting their representatives, or will they continue the representation and thus tacitly accept

¹ See R. B. Mowat, in *B.Y.B.I.L.*, 1923-4, p. 90. The position of Luxemburg as a Member of the League is by no means clear (see McNair in Oppenheim (4th ed.), I, § 100, note).

² Liechtenstein, with a population of 11,000, was refused admission to the League in 1921 as "it did not appear to be in a position to carry out all the international obligations imposed by the Covenant".

the altered status of the Holy See? It is of interest and also of importance to note that the war of 1914-18 led to considerable changes in the diplomatic relations of the Papacy. M. Fauchille states that whereas before the war fourteen states were represented at the Vatican, in 1921 twenty-four were represented there. Not only have many of the new states entered into diplomatic relations with the Holy See, but Great Britain, hitherto unrepresented, has entered into diplomatic relations, and Holland, Luxemburg, Portugal, Venezuela, Switzerland, and France have renewed their representation. It does not appear that any change will be necessary, the continued residence of Diplomatic agents accredited to the Vatican will be an acceptance of the territorial sovereignty of the Pope.

A. PEARCE HIGGINS.

TRUSTS AND MANDATES

"(1) To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the states which formerly governed them . . . there should be applied the principle that the well-being and development of such peoples form a sacred *trust* of civilization. . . . (2) The best method of giving practical effect to this principle is that the *tutelage* of such peoples should be *entrusted* to advanced nations . . . and that this *tutelage* should be exercised by them as *mandatories* on behalf of the League."

Article 22 of the Covenant is so loosely worded that textual comment on it is difficult; but of the three analogies with private law which it contains, *tutela* is introduced as being "the best method of giving effect" to the *trust* which has been declared in the preceding words, and *mandatum* is then added to define the method in which the *tutela* is to be exercised. The language seems to point to the *trust*, and not to either of the other concepts, as the governing principle of the new institution.¹ If this is the fair interpretation of the article, a true understanding of the nature of a trust may not only have a bearing on the abstract question of sovereignty over the mandated areas, but may sometimes also give us a clue to determine doubtful points regarding the actual powers of the mandatory. The "trust" analogy is unfortunately obscured in the French text, where the corresponding words are "une mission sacrée de civilisation", and Continental writers tend in consequence to treat *tutela* as the dominant analogy.²

It is notoriously difficult for the civilian to understand the English trust, and English lawyers are not as a rule very good at explaining it. In particular we find it difficult—often it is safer that we should not try—to look squarely at our trust apart from its history. Also, legal theory has never been our strong point, and we have generally been content to force our native trust concept into alien categories of legal analysis. But the law of mandates is in the making, and if it is to make full use of the trust principle, as I am prejudiced enough to believe would be for its health, it is essential that we should disengage the concept from the accidents of history, from the misleading technique with which our system still enshrouds it, and from our own rather crude theorizing about it.

¹ This seems to be also the view of Dr. A. D. McNair (Oppenheim, 4th ed., Vol. I, p. 205).

² e.g. Van Rees, *Les Mandats internationaux*, Part I, Ch. I. Stoyanovsky, *La Théorie générale des Mandats internationaux*, suggests alternative definitions of the mandate based on *trust* and *tutela* respectively (p. 47), but he himself emphasises the latter (e.g. p. 86).

Civilians on the Continent have of late years begun to recognize how important a contribution the neglected field of English Law is capable of making to general legal theory, and one of them, M. Pierre Lepaulle, has recently offered us a penetrating interpretation of our trust.¹ He begins by pointing out the impossibility of explaining the essence of the trust either as a right *in personam* of the *cestui qui trust* against the trustee, or as a partition of property rights between these two. To understand the trust we must discover the essential elements that are present in trusts of all kinds, express, implied (constructive and resulting), private, public, charitable; and we shall reach no result so long as we start from the notion of rights and duties, since no single definite right or duty is necessarily present in all trusts. All that is necessary for the existence of a trust is a *res* and an appropriation of that *res* to some aim; even a trustee is not necessary for the existence of a trust, though he becomes so for its normal functioning. "The rights and obligations of the trustee will vary according to only one thing, his mission. Such mission always consists in insuring that the *res* be properly appropriated to the aim to which it has been devoted, either by the settlor, by the court, or by operation of law. The rights that the trustee will have in each particular case depend on his obligations; they are tools given to him for the fulfilment of his duties, and such duties are determined by the appropriation to which the *res* has been devoted. Hence, it is apparent: that trustee, *cestui*, rights and obligations of either of them, are only means for reaching an end, and that no one of these means is in itself essential to the existence of the trust; that the essence of such legal institution can only be found in the *res* and its appropriation to some aim. Trusts appear to us, then, as a segregation of assets from the *patrimonium* of individuals, and a devotion of such assets to a certain function, a certain end."

If this is the essence of the trust, certain consequences, M. Lepaulle thinks, follow. (1) The trust is not a species of ownership, but an institution to be contrasted with ownership; e.g. any or all of the three traditional elements of ownership, *usus*, *fructus*, *abusus*, may be absent from a trust, and elements foreign to the idea of ownership are always present in it, e.g. the right to follow the *res* in its economic transformations. In fact "the two legal institutions have back of them two profoundly different and even opposed philosophies. It is indeed significant to see them both flourish side by side in Anglo-Saxon countries where individualism and social spirit are at the same time developed to a high degree. We may therefore conclude on this point in saying that Anglo-Saxon countries have two different régimes for property: individual ownership and trusts." (2) The trust concept drives us to reconsider the traditional dogma of "no right without a subject". It is true that Anglo-Saxon theory remains faithful to this dogma, and it is true that only a person can *enforce* a right. But enforcement is not the right itself; "anything that is worth being protected by law should have rights: animals, things, ideas, &c." The objections to such a theory lose their force when we study the trust. (3) Alternatively, if we maintain the theory of no right without a subject, the trust compels us to find a new basis for a right. Traditional theories—the free will of the subject, or his protected interests—will not serve: "the only possible theory is that *the rights of the trustee have their foundation in his obligations*: they are *tools* given to him in order to achieve the work

¹ "An Outsider's View-point of the Nature of Trusts"; *Cornell Law Quarterly* Vol. XIV, p. 52.

assigned to him. The trustee gets all the tools necessary for such end, but only those. . . . We reach therefore a social theory of subjective rights that opposes itself to the classical theories based on individualism."

Mutatis mutandis, does not this explain the essence of the mandate? Anglo-Saxon law has two different régimes for property, viz. ownership and trust; International Law has two different régimes for government, viz. sovereignty (under whatever reserves we like to make as to the meaning of that term) and mandate. Mandated territories "have ceased to be under the sovereignty of the states which formerly governed them"; they have passed into the régime of the mandate. It is as idle to attempt to force the mandate, which is a social institution, into the individualist concept of sovereignty, as it is to force the trust into a scheme based only on private property. We do the latter because tradition is stronger than logic; but in the international sphere, where we have a *tabula rasa* to write upon, it is unreasonable that our theory should confuse itself by a servile traditionalism. Further, such a theoretical foundation is exactly suited to the working out of the system of the "mandate—trust". It safeguards the ideal purpose of the institution, and at the same time secures its practical efficiency. For the mandatory's rights, like the trustee's, have their foundation in his obligations; they are "tools given to him in order to achieve the work assigned to him"; he has "all the tools necessary for such end, but only those". For example, to give one instance only, he must obviously have the right to punish treason, as the Supreme Court of South Africa decided in *Jacobus Christian v. Rex*,¹ though much of the Court's reasoning in that case, however necessary it may have been for bringing the offence under the category of treason according to South African Law, was, it is submitted, internationally redundant.

J. L. BRIERLY.

THE CHANNEL TUNNEL

THE revival of discussion upon the question of the Channel Tunnel involves certain problems that are of interest from the point of view of International Law. There has been a long-standing academic controversy over the question whether the sea is a *res communis* or a *res nullius*, and in an earlier volume of the *Year Book* (1923, p. 34) Sir Cecil Hurst has made it clear that limited portions of the sea-bed are undoubtedly capable of appropriation without prejudice to the common right of navigation in the water that flows above them. So far as this goes, it favours the view that practice supports the doctrine of the *res nullius*, and indeed it is not now suggested that Great Britain and France require to obtain the consent of other states for the construction of a tunnel.

The legal consequences of such an appropriation raise questions of more practical interest. The Anglo-French Commission which drew up a draft scheme in 1876 (Cd. 1576) proposed that the frontier between the two countries should be fixed at a point midway, the tunnel on either side of the frontier being national territory, but that no claim should be made to any jurisdiction in the surface of the sea-bed or in the water above it. The contract for construction was to be awarded to two companies, one from each side, and it was further provided that either state should have the right to destroy the tunnel, subject only to an obligation to compensate its own national company upon such terms as it might think

¹ Cf. this *Year Book*, 1925, p. 211.

fit. The details of civil and criminal jurisdiction were to be regulated by supplementary conventions.

What would be the result in time of war? Let us suppose that France is at war and that Great Britain is neutral. If the southern half of the tunnel is wholly French territory, presumably it is open to attack and destruction by the enemy of France. If he was conducting a naval blockade of the French coast, such action would obviously be essential to the effectiveness of his blockade. Could we complain on the ground that the destruction of the French end incidentally involved the ruin of our own? In the absence of any clear agreement expressly limiting the rights of a belligerent it is very doubtful whether we should be able to make out a good claim for anything more than a money compensation. The Hague Convention and the practice of modern wars alike sanction the cutting of submarine cables connecting belligerent with neutral territory, and the submarine cable furnishes the nearest analogy to the tunnel in a situation which would be without any exact precedent.

It is obviously desirable that so colossal an undertaking should, so far as possible, be insured against the risk of being destroyed to serve some temporary military end, and it seems clear that a merely bilateral agreement is not sufficient security. The practical moral would seem to be that we should seek to obtain a general international agreement neutralizing the tunnel on the same principle as the Suez Canal. If it is ever constructed, its economic importance will extend far beyond Great Britain and France. It will serve all Europe, and Europe should be willing to take an interest in its preservation. There is no need to adopt the inconvenient system of control by an international authority, and it would undoubtedly be best to treat the tunnel as national territory for all purposes of ordinary jurisdiction. But for security in time of war a broader basis of agreement would seem to be essential.

Perhaps it might be necessary to extend the neutralized area to the entrances and immediate approaches of the tunnel. If so, difficult questions of detail would arise which are too complicated for discussion in this note, but the difficulties should not be insurmountable, if the principle of neutralization is accepted. For the present it is enough to suggest that the question is one which calls for the most careful consideration.

H. A. S.

RULES OF EVIDENCE IN INTERNATIONAL PROCEEDINGS

PROFESSOR JESSUP, in an article in the *American Journal of International Law* for October 1928 (Vol. XXII, pp. 735-52), on the subject of the award in the arbitration between the United States and the Netherlands in the case of the Island of Palmas (or Miangas), makes some interesting comments on the rules governing the establishment of controverted facts in international proceedings; he points out the difference in the outlook on such questions of lawyers trained in the civil law from that of their brethren of the common law, and while agreeing that "no one would wish to impose all the complexities of our jury-born rules of evidence on international tribunals, they should be kept as free as possible", he concludes nevertheless that definite rules are needed and that the subject might be appropriate for the consideration of those interested in the progressive codification of International Law.

The present writer, basing himself on only a brief experience of international

contests, ventures to agree that certain rules are needed, notably as to the stage in the proceedings at which statements of fact should be made and either admitted or denied. Whether codification in the formal sense is the best approach to the question is another matter. Article 40¹ of the revised rules of the Permanent Court of International Justice goes some way to establish a regular order of procedure and to introduce at the proper stage the essential necessity of acceptance or denial of the affirmation of the opponent. Such regulation is far easier when international proceedings are conducted as between plaintiff and defendant, and the old quasi-diplomatic method of a simultaneous production of "cases", which did not necessarily result in the joinder of an issue or issues, is left behind.

On another part of the law of evidence, specially delicate in international matters, namely, the extent to which for the purpose of the interpretation of a treaty or other international document a reference may be allowed to *travaux préparatoires* or statements of intention not included in a final text, the Court has already gone far in the development of what a common lawyer will welcome as sound principles. Thus, in Advisory Opinion No. 12 (Mosul Case), p. 22, the Court said—

"Since the Court is of opinion that Article 3 is in itself sufficiently clear to enable the nature of the decision to be reached by the Council under the terms of that Article to be determined, the question does not arise whether consideration of the work done in preparation of the Treaty of Lausanne (*les travaux préparatoires*) would also lead to the conclusions set out above";

and again in Advisory Opinion No. 14 (Danube Commission), p. 28:

"The Court adheres to the rule applied in its previous decisions that there is no occasion to have regard to the protocols of the Conferences at which a Convention was negotiated in order to construe a text which is sufficiently clear in itself"; and p. 31:

"Preparatory work should not be used for the purpose of changing the plain meaning of a text."

But for a gathering of lawyers, trained in two conflicting systems, to establish any code going beyond the present practice of the Permanent Court might be difficult. On the whole it may be wiser, for the present at any rate, not to attempt the adventure. The authority of the Permanent Court may be relied on to prevent anything in the nature of a successful attempt to obtain the establishment, by the mere *ipse dixit* of a litigating state, of a fact not admitted by the other side.

J. F. W.

¹ Article 40. "Cases shall contain:

- (1) a statement of the facts on which the claim is based;
- (2) a statement of law;
- (3) a statement of conclusions;
- (4) a list of the documents in support; these documents shall be attached to the Case.

Counter-Cases shall contain:

- (1) the affirmation or contestation of the facts stated in the Case;
- (2) a statement of additional facts, if any;
- (3) a statement of law;
- (4) conclusions based on the facts stated; these conclusions may include counter-claims, in so far as the latter come within the jurisdiction of the Court;
- (5) a list of the documents in support; these documents shall be attached to the Counter-Case."

THE CALCULATION OF DAMAGES IN INTERNATIONAL CASES

JUDGMENT No. 13 of the Permanent Court of International Justice in the Chorzow case (Publications of the Permanent Court of International Justice, Series A, No. 17), delivered in September 1928,¹ suggests some reflections as to the principles on which damages should be calculated in an international case. The question at issue was the amount to be paid by Poland for a wrongful seizure, in the year 1922, of a nitrate factory. The majority of the Court directed an expert inquiry on the following questions:

"I.—A. What was the value, on July 3, 1922, expressed in reichsmarks current at the present time, of the undertaking for the manufacture of nitrate products of which the factory was situated at Chorzow in Polish Upper Silesia, in the state in which that undertaking (including the lands, buildings, equipment, stocks, and processes at its disposal, supply and delivery contracts, goodwill and future prospects) was, on the date indicated, in the hands of the Bayerische and Oberschlesische Stickstoffwerke?

B. What would have been the financial results, expressed in reichsmarks current at the present time (profits *or losses*²), which would probably have been given by the undertaking thus constituted from July 3, 1922, to the date of the present judgment, if it had been in the hands of the said Companies?

II.—What would be the value at the date of the present judgment, expressed in reichsmarks current at the present time, of the same undertaking (Chorzow) if that undertaking (including lands, buildings, equipment, stocks, available processes, supply and delivery contracts, goodwill and future prospects) had remained in the hands of the Bayerische and Oberschlesische Stickstoffwerke, and had either remained substantially as it was in 1922 or had been developed proportionately on lines similar to those applied in the case of other undertakings of the same kind, controlled by the Bayerische, for instance, the undertaking of which the factory is situated at Piesteritz?"

The majority in so doing based themselves on the principle that

"reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.

"This conclusion particularly applies as regards the Geneva Convention, the object of which is to provide for the maintenance of economic life in Upper Silesia on the basis of respect for the *status quo*. The dispossession of an industrial undertaking—the expropriation of which is prohibited by the Geneva Convention—then involves the obligation to restore the undertaking, and, if this be not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible. To this obligation, in virtue of the general principles of international law, must be added that of compensating loss sustained as the result of the seizure. The impossibility, on which the Parties are agreed, of restoring the Chorzow factory could therefore

¹ See p. 236, *post*.

² Italics not in the original.

have no other effect but that of substituting payment of the value of the undertaking for restitution; it would not be in conformity either with the principles of law or with the wish of the Parties to infer from that agreement that the question of compensation must henceforth be dealt with as though an expropriation properly so called was involved."

They further explained that they considered it desirable

"to endeavour to ascertain the value to be estimated by several methods, in order to permit of a comparison and if necessary of completing the results of the one by those of the others. The Court, therefore, reserves every right to review the valuations referred to in the different formulae; basing itself on the results of the said valuations and of facts and documents submitted to it, it will then proceed to determine the sum to be awarded to the German Government, in conformity with the legal principles set out above."

Lord Finlay dissented. He held that Question II ought not to have been put to the experts, and he disagreed with what was said in the judgment of the majority as to the principles governing the assessment of the indemnity; "a party who has given up his right to *restitutio in integrum*", said Lord Finlay, "is not entitled to claim damages on the footing that it is right that he should have the enhanced value, if any, that he would have got if he had pressed his claim for restitution. The German Government having renounced restitution cannot make good a claim to recover an amount representing the value of the property which would have to be restored. It has given up restitution and elected to take damages, and these damages must be assessed according to the general rule as at the time of the wrong. . . .

"In my opinion, according to the general principle of international law, these damages should be assessed upon the basis of the value of the undertaking at the time of the seizure, that is July 3, 1922, together with a fair rate of interest on that value from that date until the date of payment; and in addition any other damage directly consequent upon the seizure."

Dealing specifically with Question II he said:

"If the relevant time for determining the value of the undertaking is the time of the seizure, it follows that the value of the undertaking at the present time, had it remained in the hands of the Oberschlesische and the Bayerische, is irrelevant except in so far as it may give some assistance in determining the value at the time of the seizure. It is not necessary to refer to the experts any question directed to the value at the present time. I think, therefore, that Question II is unnecessary.

"Further, I consider this question unsatisfactory in itself. It is directed to two values under hypothetical conditions. The first of those values is dependent upon the hypothesis that the undertaking remained substantially in the condition in which it was in 1922. It would be difficult to say what the present-day value of the undertaking in such an obsolete condition would be. The second of those values is dependent upon a hypothetical development of the undertaking. The development which the question assumes is one 'proportionately on lines similar to' the development which has taken place in what are alleged to be parallel undertakings. It would be difficult to determine the proportions of development applicable. The question of what undertakings may be taken into consideration for this purpose seems to be one for the experts themselves, and I think that Question II would present great difficulty in the working."

These observations appear to the present writer to be unanswerable; they were in effect concurred in by M. Bustamante and were supported by the observations of M. Nyholm.

It might be added that if in answer to Question I. B the experts were to find that the financial results would have been losses, such a finding must inevitably have produced an effect on the answer to Question I. A. A losing concern may be worth only a break-up price of its land and stock-in-trade. Indeed, if losses would have resulted to the Companies and the Companies were therefore saved from those losses by the wrongful expropriation, ought not those losses to have been taken into account in diminution of the value reached under I. A? If the Court is right in giving damages, not on the basis of the value of the thing taken away, with interest from the date of the taking, but on a conjectural estimate of the results of keeping the thing taken away, it is difficult to see why any damages should be awarded when the plaintiff has been spared a loss. Question I on this hypothesis would have given an unsatisfactory result and reliance would have had to be placed on Question II alone. But Question II is equally affected by the hypothesis of a loss. If the Companies would have made a loss, the value assessed according to Question II would have been something less than the value of the whole concern in July 1922, with interest on that value to the date of the judgment.

The majority of the Court, on the other hand, were impressed by the argument that, on Lord Finlay's principles, the Polish Government would pay no more than if it had expropriated the Company by normal proceedings, and they were anxious to impose on the wrongdoer something in the nature of a penalty. They seem, however, to have assumed, almost unconsciously, that profits and not losses would have been made; otherwise in one possible event their method would result in a smaller amount than Lord Finlay's. The majority were also anxious to achieve what to an English mind would seem an almost impossible exactitude in measuring the amount of the damages.

As already indicated, Lord Finlay did not stand alone in his dissent from the conclusions of the majority; the issue therefore was not one on which judges trained on continental principles were on one side and those nourished on the practice of Circuits and the Law Courts were on the other; but it is perhaps not fanciful to see in Lord Finlay's criticisms the result of that disinclination to confuse penalties with damages and that preference for the rougher and readier methods of computing loss which result from long forensic and judicial experience in the atmosphere of the jury and the Common Law. Law, in one aspect, and particularly International Law, is no doubt a science, but it is not an exact science, and if it seeks to measure with mathematical accuracy the hypothetical pecuniary consequences of human action, it may end by divorcing itself from reality and setting itself tasks which the very nature of its problems makes insoluble.

J. F. W.

THE ENFORCEMENT OF FOREIGN JUDGMENTS

As all English lawyers are well aware, judgments of a foreign court for a sum of money are, by action upon the judgment, regularly and speedily enforced in England, unless these judgments come under certain well-defined exceptional rules, and the English courts will not permit the merits of the case to be discussed, but treat the foreign judgment as conclusive in fact and in law. Other foreign judgments, unless they come within these exceptional rules, though not

enforceable, are recognized as conclusive in fact and in law of the issues with which they deal. The recent case of *Jacobson v. Frachon*¹ in the English Court of Appeal, where a French judgment was held to be final and conclusive and a defence to English proceedings on the same matter, though the Court was of opinion that it was based upon a report of a "referee" which was the "uncandid production of a biassed and prejudiced mind", is a good instance of the practice of the English courts and shows that the English procedure is well defined and in no way leaves the matter at large to the discretion of the judge.

English lawyers are, however, by no means aware that English judgments are enforced or recognized in practically no foreign country except the United States of America, where the Anglo-Saxon procedure prevails. In France, for instance, when proceedings are brought for the enforcement of a foreign judgment, the French courts first satisfy themselves that the foreign judgment fulfils certain conditions (conditions which, though not the same, are fairly similar to those required by an English court when an action on the judgment is brought). If the foreign judgment is found to satisfy these conditions, then an exequatur is granted, if there is a convention to this effect with the country from which the judgment issues. In the absence of such convention, however (except in judgments relating to matters of personal status), the French courts have the right, which they apparently almost invariably exercise, of revision, which means that the case is reopened on its merits and the proceedings are, so far as delay and expense are concerned, equivalent to a retrial of the case *de novo*. The foreign judgment is not regarded as final, but merely as a *titre* or instrument on the basis of which certain conservatory measures can be taken (*viz.* the preservation of assets in the hands of the judgment debtor).

In Belgium and in perhaps the majority of continental countries, the position is substantially the same as in France. No conventions have been made by this country providing for the enforcement of judgments. In Germany and a certain number of other countries the position is in one respect somewhat different. Foreign judgments are enforced if there are conventions to that effect, or alternatively if the German courts are satisfied that reciprocal treatment is given in the country in which the judgment was given. Strange as it may seem in view of the constant practice of the English courts in enforcing foreign judgments, the German Supreme Court at Leipzig has held that the English practice does not constitute sufficient reciprocity. This view of the English courts may very likely be due to one or other or a combination of both of the following facts: (*a*) That the English procedure is by way of bringing an action on the judgment instead of granting registration or exequatur to the foreign judgment (and therefore does not appear to be in form what it is in fact, an enforcement of the foreign judgment), and (*b*) that the rules of English Law in which are laid down the cases in which foreign judgments are enforced are rules of Common Law and therefore more difficult to state precisely (and especially in the form of official assurances) than the provisions of a Statute or a Code. A contributory cause of the present rather unhappy position may be that the procedure of the English courts takes no account whatever of considerations of reciprocity, and therefore both the Government and the courts are without weapons or means of retaliation to secure better treatment for English judgments abroad. It would not appear to be possible for this country to enter into conventions for the reciprocal enforcement of judgments

¹ 44. T.L.R. 103 (C.A.).

in the absence of some fresh legislation, though it would appear that it would be possible to achieve this end by legislation which would change the form rather than the substance of the matter and leave the English courts with a measure of control not substantially less than or different from that which they possess under the existing rules of English Common Law.

The present position operates entirely to the disadvantage of English commercial firms, since whereas their foreign customers can obtain judgments against them abroad and enforce them in this country, the English firms, if they obtain judgment against their foreign customers in this country, are unable to enforce such judgments abroad.

W. E. B.

ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES

THE first volume of this Digest, some account of which was given in the *Year Book* for 1928 (p. 112), has been somewhat delayed in publication, but it should be in the hands of the public before these lines are read. For the present, it is hardly necessary in these pages again to emphasize the great value of the work undertaken by Drs. McNair and Lauterpacht and their collaborators under the auspices of the Department of International Studies of the London School of Economics and Political Science; it may, however, be permitted to the Editors of the *British Year Book* to wish all success to an enterprise so well in harmony with the traditions of British scholarship and law.

GENERAL CONVENTIONS PREPARED AT GENEVA IN 1928

I

PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES; GENERAL ACT.¹

THE Assembly of the League of Nations, at its meeting held during its ninth ordinary session on September 26, 1928, adopted a General Act containing provisions for the pacific settlement of international disputes.

The General Act consists of four chapters:

Chapter I. Relating to conciliation.

Chapter II. Relating to judicial settlement.

Chapter III. Relating to arbitration.

Chapter IV. Containing general provisions regarding the above-mentioned methods for the settlement of international disputes.

Article 17 in Chapter II provides for the compulsory submission to the Permanent Court of International Justice of all disputes in which the parties "are in conflict as to their respective rights".

Article 21, Chapter III, provides that any dispute, not of the kind referred to in Article 17, which is not settled by conciliation, may be brought before an arbitral tribunal.

Any dispute of any kind may, if the parties so agree, be first submitted to conciliation in accordance with the terms of Chapter I. Disputes not dealt with under Articles 17 or 21 *must* be submitted to conciliation if either party so desires.

The provisions relating to the establishment of a conciliation commission follow the model of the Locarno Treaties of Arbitration and Conciliation.

The provisions relating to the establishment of arbitral tribunals follow roughly the model of The Hague Convention of 1907.

¹ The text of this General Act is to be found in League of Nations Document C. 537, M. 164 IX (1928).

Points of special interest in the General Act are as follows:

1. By Article 38 signatories may accept the whole Act, or may exclude from it either Chapter III (Arbitration) or Chapters II and III (Judicial Settlement and Arbitration). The signatories are to be classified in three lists denominated respectively "A", "B", and "C", according to the nature of their accession.

2. By Article 39 the parties may exclude from the operation of the General Act: (a) disputes arising out of prior facts; (b) disputes which are by International Law "solely within the domestic jurisdiction of states"; (c) "disputes concerning particular cases or clearly specified subject matters".

This makes a wide range of possible reservation to the compulsory clauses of the Act.

3. By Article 28 in disputes submitted to an *ad hoc* Arbitral Tribunal, the Tribunal, unless otherwise instructed in the *compromis* "shall apply the rules in regard to the substance of the dispute enumerated in Article 38 of the Statute of the Permanent Court of International Justice. In so far as there exists no such rule applicable to the dispute, the Tribunal shall decide *ex aequo et bono*."

4. By Article 33 the Court or Arbitral Tribunal may lay down "provisional measures" to maintain the *status quo*.

5. By Article 45 the General Act is concluded for a period of five years, and will remain in force for further periods of five years unless denounced.

6. By Article 41 disputes relating to the interpretation or application of the General Act, including disputes under Articles 17, 21, and 39, relating to classification of disputes and the scope of reservations, shall be submitted to the Permanent Court.

7. The General Act makes no mention of the functions of the Council of the League of Nations in connexion with disputes, in order that it may be equally acceptable to states not Members of the League.

II

CONVENTIONS RELATING TO THE ABOLITION OF IMPORT AND EXPORT PROHIBITIONS AND RESTRICTIONS.¹

At a Conference held in Geneva from October 17 to November 8, 1927, a Convention for the abolition of Import and Export Prohibitions and Restrictions was drawn up. Three international agreements supplementary to the Convention of November 8, 1927, were agreed to by Conferences held in Geneva between June 28 and July 11, 1928. These agreements are as follows:

1. Supplementary Agreement to the Convention of November 28, 1927, for the Abolition of Import and Export Prohibitions and Restrictions (and Protocol).²

2. International Agreement relating to the Exportation of Hides and Skins (and Protocol).³

3. International Agreement relating to the Exportation of Bones (and Protocol).⁴

¹ For the text of this Convention and the annexed Protocol and Declaration see League of Nations Document C. 14, M. 11. 1929. 11.

² The text of this Agreement and Protocol can be found in L.N. document C. 13, M. 10. 1929. 11.

³ Text of this Agreement and Protocol can be found in L.N. document C. 11, M. 8. 1929. 11.

⁴ Text of this Agreement and Protocol can be found in L.N. document C. 12, M. 9. 1929. 11.

Supplementary Agreement to the Convention of November 8, 1927.

The purpose of this Agreement was to decide what reservations to the Convention of November 8, 1927, should be permitted to the various signatory Powers, and to settle the conditions under which the Convention should come into force.

Under the terms of the Supplementary Agreement eighteen reservations were permitted to various signatory Powers, of which ten were of minor importance as regards world trade. The exceptions allowed may be classified under two heads:

(a) Those concerning prohibitions permitted on non-economic grounds (national defence, public morality, public health, &c.), or by reason of exceptional circumstances (famine, disasters, &c.).

(b) Those maintained temporarily or permanently with the assent of the other contracting parties.

These two categories include authorized Prohibitions of both Import and Export of Coal and derived products (Germany and Czechoslovakia), of Import of Dye Stuffs (Great Britain and Japan), &c.

The Agreement also provides that the Convention must be ratified or acceded to by the large number of at least eighteen states to bring it into force, and that contracting parties may individually stipulate that its entry into force for themselves shall depend upon the accession of certain other countries.

By the Treaty hundreds of Prohibitions are to be removed. The Convention, according to an opinion expressed by the President of the Conference of July 1928, "constitutes the first important multilateral treaty directly affecting economic relations between peoples".

International Agreement relating to Hides and Skins.

By this Agreement the contracting parties undertake to suppress by October 1, 1929, all Prohibitions to the export of Hides and Skins.

They also undertake not to impose any export duty on these commodities, an exception being made for Roumania, which retains the liberty to impose duties, but declares that the duties shall not be excessive.

International Agreement relating to Bones.

By this agreement the contracting parties undertake to suppress all Prohibitions of the Export of Bones by October 10, 1929, exception being made for Italy. Signatory Powers are allowed to maintain export duties which, for most of the contracting parties, are not to exceed 1.50 fr. (gold) per 100 kilos.

These Agreements are the first multilateral international treaties which fix the rate of tariff duties to be imposed by signatory Powers.

III

INTERNATIONAL CONVENTION RELATING TO ECONOMIC STATISTICS.¹

THE International Conference relating to Economic Statistics held in Geneva from November 26 to December 14, 1928, adopted the above Convention, the Protocol attached thereto, and the Final Act of the Conference, together with a series of annexes including detailed and voluminous descriptions of the various categories of statistics dealt with.

¹ The text of this Convention and of the Protocol attached thereto and the Final Act of the International Conference relating to Economic Statistics, can be found in League of Nations document C. 606 (1) M. 184 (1). 1928. 11.

The Convention, together with the annexed documents, falls into the following divisions:

(a) A series of clauses under which the Governments undertake to publish certain classes of statistics at certain defined (or undefined) intervals.

(b) An annex containing stipulations which are obligatory concerning the methods to be applied in the compilation of statistics of international trade.

(c) Five further annexes laying down, as a guide, principles which it is recommended should be adopted in so far as possible in the compilation of statistics of minerals and of fisheries, in the computation of indices of economic activity, and in the taking of censuses of industrial or agricultural production.

(d) Provision for the appointment of a special Committee of Experts to continue the study of the improvement of economic statistics and the ways and means of achieving still greater comparability in the future.

(e) General articles dealing with the date of the entry into force of the Convention, the settlement of disputes, the duration of the Convention, &c.

The following points should be specially noted:

1. The obligation of all signatory Powers to publish the following classes of statistics is absolute in all cases:

“Annual returns of the area under crops and the quantities of crops harvested, monthly statistics of the production of a given list of minerals and metals whenever they are of national importance, monthly and annual returns of quantities and values of imports and exports, annual returns of the tonnage of vessels entered and cleared at national ports, monthly indices of wholesale, and quarterly indices of retail prices.”

2. Certain other classes of statistics are also obligatory, but the date on which the first return is to be made is not defined, while other classes again are only to be published according to the importance of the particular economic phenomena involved in the life of the individual state.

3. The classification of trade statistics according to *countries of origin, purchase, consumption, or destination* is to be begun experimentally in accordance with certain agreed principles, and with a view to subsequent definite agreement.

The problem of classification of trade statistics according to *commodities* was adjourned until the League Committee on Tariff Nomenclature had reached a more advanced stage of its work.

4. The Committee of Technical Experts to be established under Article 8 is to be appointed by the Council of the League acting jointly with one delegate from each acceding country not a Member of the League. The Committee is empowered to make any suggestions for the improvement or amplification of the method of classifying statistics, and may give an advisory opinion upon disputes voluntarily submitted to it by signatory Powers.

5. The Convention contains no other clause concerning the settlement of disputes arising out of its terms.

6. The signatory Powers also undertake by Article 9 that their respective Statistical Services shall exchange with each other the statistical returns compiled and published by them in accordance with the provisions of the Convention.

IV

DRAFT CONVENTION CONCERNING THE CREATION OF MINIMUM WAGE-FIXING MACHINERY¹

THE General Conference of the International Labour Organization, at its eleventh Session, held in Geneva from May 30 to June 16, 1928, adopted the above Draft Convention, which is to come into force as a binding engagement twelve months after the day it is ratified by any two of the Members of the International Labour Organization.

The Convention provides that each ratifying Member shall create machinery by which minimum rates of wages can be fixed in "trades" (including manufacture and commerce) in which "no arrangements exist for the effective regulation of wages by collective agreement or otherwise, and wages are exceptionally low".

Each ratifying Member has to decide for itself what are such "trades", and also the nature of the machinery to be established; provided that the machinery shall ensure effective consultation with representatives of the employers and workers concerned, and provided that the rates of wages fixed shall not thereafter be reduced by individual or collective agreement. The Convention further provides for effective publicity for the minimum rates so established and for the exchange of information with regard to the working of the Convention, through annual reports to be made by signatory Powers to the International Labour Office.

The Convention is accompanied by a "Recommendation" which stipulates, *inter alia*, that special consideration should be given to "trades" in which women are ordinarily employed; that, so far as possible, employers and workers shall in equal numbers take a direct part in the work of the wage-fixing body; and that, in the fixing of wages, account should be taken of the necessity of enabling the workers concerned to maintain "a suitable standard of living".

¹ The text of this Convention and the accompanying recommendation can be found in the I.L.O. Official Bulletin, July 31, 1928, supplement to volume 13, No. 3.

DECISIONS, OPINIONS, AND AWARDS OF INTERNATIONAL TRIBUNALS, 1928

JUDGMENTS AND ADVISORY OPINIONS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

JUDGMENT NO. 11. DELIVERED DECEMBER 16, 1927.

*Interpretation of Judgments Nos. 7 and 8, concerning the case of the Chorzow Factory.*¹

In these proceedings the German Government sought an interpretation of the above-mentioned judgments under Article 60 of the Court's Statute, which provides that "the judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment the Court shall construe it upon the request of any party." The Application, filed on October 18, 1927, alleged that a divergence of opinion had arisen between the German and Polish Governments in regard to the meaning and scope of the judgments in question and requested the Court to declare that the Polish thesis was not in accordance with their true construction.

By Judgment No. 7 (which is reported in the *Year Book* for 1927) the Court decided (*inter alia*) that the deletion from the land registers of the name of the Oberschlesische Company as owner of the factory at Chorzow and the substitution of the Polish Treasury was not in conformity with Poland's obligations under the Geneva Convention. Following abortive negotiations between the two Governments for the purpose of arriving at a friendly settlement on the basis of this decision, the German Government instituted proceedings for the purpose of establishing its right to compensation. Poland took the objection that the Court had no jurisdiction to entertain this suit, and this objection was overruled in Judgment No. 8 (reported as No. 9² in the *Year Book* for 1928). Shortly after the date of this judgment the Polish Government instituted proceedings in the District Court of Katowice, within the jurisdiction of which the factory is situated, against the Oberschlesische, claiming declarations that the Company was not the owner of the property and that the ownership fell to the Polish Treasury. The District Court granted the relief sought in default of appearance by the Company. The point now raised by the German Government before the International Court was that the Polish Government was ill-founded in contending that in Judgment No. 7 the Court had reserved to the latter Government the right of annulling by process of law the entry of the Oberschlesische as owner in the land registers.

The Polish Government submitted, in the first place, that effect should not be given to the German request for an interpretation on the ground that there

¹ The judgments and advisory opinions of the Court and the Acts and documents relating thereto are issued by the Court in three series, namely *Judgments* (Series A), *Advisory Opinions* (Series B) and *Acts and Documents relating to Judgments and Advisory Opinions* (Series C). The publisher is A. W. Sijthoff's Publishing Co., Leyden. (English Agents: Butterworth & Co., Bell Yard, W.C. 2).

² An error was made in the numbering of the judgments reported last year, owing to the fact that the numbers on the Court's Judgments no longer correspond with the numbers of the issues of Series A.

was no dispute between the two Governments within Article 60 of the Statute. The Court, however, observes that this provision does not require the manifestation of the existence of a dispute in a specific manner, as by diplomatic negotiations. Although it is no doubt desirable that a state should not summon another before the Court without having previously made it clear that there is a difference which has not been capable of being otherwise overcome, it is sufficient if the two Governments have in fact shown themselves as holding opposite views in regard to the meaning and scope of a judgment of the Court. The expression "meaning or scope of the judgment" in Article 60 should be compared with the terms of the preceding article of the Statute, which states that a decision of the Court has no binding force except between the parties and in respect of the particular case decided. The natural inference is that the second sentence in Article 60 was inserted in order, if necessary, to enable the Court to make quite clear the points which had been settled with binding force in a judgment and, on the other hand, to exclude requests for interpretation not having that object. In order that a difference of opinion should become the subject of a request for an interpretation there must, therefore, exist a difference of opinion as to those points in the judgment in question which have been decided with binding force. Further, a difference as to whether a particular point has or has not been decided with binding force also constitutes a case within the terms of Article 60.

From a detailed examination of the negotiations and history of the matter the Court comes to the conclusion that there is in the present case a true dispute, within the above definition, in respect of Judgment No. 7, because the German Government maintained that that judgment finally decided, with binding effect as concerns the claim for compensation put forward on behalf of the Oberschlesische, the question of the right of ownership possessed by the Company over the Chorzow factory under municipal law, whereas the Polish Government supported the opposite view.

It should be noticed that the Polish Government contended that only the operative part of a judgment can be the subject of a request for interpretation (which was not the case here), but the Court rejected this view. The fact that the grounds for the judgment contain a passage which one of the parties construes as a reservation, the effect of which would be to restrict the binding force of the judgment, allows of the Court's being validly requested to give an interpretation fixing the true meaning and scope of the judgment in question.

As regards Judgment No. 8 the Court held that its interpretation was not directly in issue. Certain passages might, however, be taken into account as showing the meaning and scope which the Court attributed to Judgment No. 7.

Having thus disposed of the preliminary question, the Court proceeded to consider the merits. The point in dispute related to a particular passage in Judgment No. 7, where the Court remarked that "if Poland wishes to dispute the validity of this entry (of the Oberschlesische in the land register) it can, in any case, only be annulled in pursuance of a decision given by the competent tribunal". From the context, it was clear that these words did not contain a reservation. The use of the present tense may show that the Court contemplated the possibility of the subsequent institution of proceedings by Poland with a view to obtaining the annulment of the entry, but it would be contrary to the whole of the reasoning to construe the passage as implying that the binding effect of the Court's judgment was to depend upon the result of such proceedings.

The conclusion of the Court in Judgment No. 7, that the attitude of Poland in regard to the Oberschlesische was not in conformity with the Geneva Convention—which conclusion had indisputably acquired the force of *res judicata*—was based, firstly, on the finding that, from the standpoint of International Law, the German Government was perfectly entitled to alienate the Chorzow factory, and secondly, on the finding that, from the standpoint of municipal law, the Oberschlesische had validly acquired the right of ownership to the factory. The finding that, in municipal law, the factory did belong to the Oberschlesische is consequently included among the points decided in Judgment No. 7 and possesses binding force in accordance with Article 59 of the Statute.

Judgment No. 7 is in the nature of a declaratory judgment, the intention of which was to ensure recognition of a situation at law, once and for all and with binding force as between the parties, so that the legal position thus established cannot again be called in question.

It was therefore adjudged by eight votes to three, that in Judgment No. 7 the Court did not reserve to the Polish Government the right of asking by process of law, after the rendering of that judgment and with application to the case thereby decided, for a declaration that the entry of the Oberschlesische in the land registers as owner of the Chorzow factory was null and void; but that by the aforesaid judgment the Court meant to recognize, with binding effect between the parties concerned and in respect of that particular case, the right of ownership of the Oberschlesische in the factory under municipal law.

The case is the first in which the Court has acceded to a request for an interpretation of one of its judgments. An unsuccessful application for this purpose is to be found in Series A, No. 4.

JUDGMENT NO. 12. DELIVERED APRIL 26, 1928.

Rights of Minorities in Upper Silesia (Minority Schools).

THIS suit was initiated by an Application filed by the German Government, based upon the alleged infraction by the Polish Government of certain provisions of the Geneva Convention concerning Upper Silesia relating to the protection of minorities. The provisions more particularly relied upon by the German Government were Articles 74, 106, and 131 of the Convention. Article 74 stipulates generally that the question whether or not a person belongs to a racial, linguistic, or religious minority may not be verified or disputed by the authorities. Article 106 provides that a minority school shall be established on the application of a national, supported by the parents or guardians of at least forty children belonging to a linguistic minority and to the same school district. Article 131 provides specifically that in order to determine the language of a pupil account shall be taken only of the statement of the person legally responsible for the child's education, and that this statement may not be verified or disputed by the educational authorities.

During the year 1926 the Polish authorities ordered an administrative inquiry to be held in order to establish the authenticity of applications for admission to the minority schools, to ascertain whether they emanated from the persons authorized to submit them and to verify the existence of the circumstances contemplated by Articles 106 and 131. As a result 7,114 entries of children in the registers of the minority schools were declared null and void, and the children

in question were excluded from attendance. The *Deutscher Volksbund* (an association representing German minority interests) thereupon submitted a petition in accordance with the procedure laid down by the Convention, which ultimately came before the Council of the League of Nations. The Council, on March 12, 1927, adopted a resolution designed to settle the dispute without deciding questions of law. Differences of opinion, however, subsequently arose as to whether this resolution applied to children of the school year 1927-8; the German representative, in particular, considered that it applied solely to the children of the 1926-7 class. At the meeting of the Council in December, 1927, he expressed the view that the time had come finally to clear up the legal questions of principle governing the admission of children to German minority schools in Polish Upper Silesia, and stated that, since the dispute was of a legal nature, his Government proposed to apply to the Court for an interpretation of the relevant provisions of the Geneva Convention. The Application was accordingly filed on January 2, 1928.

Article 72 of the Convention reproduces substantially the provisions, contained in all the so-called Minorities Treaties drawn up at the conclusion of the Great War, whereby certain substantive obligations assuring equality of treatment to minorities are placed under the guarantee of the League of Nations. The article states that Poland agrees that the stipulations of the "foregoing articles" shall be placed under the guarantee in question and that any difference as to questions of law or fact arising out of these articles, between the Polish Government and any other Power, a Member of the Council of the League, shall be regarded as a dispute of an international character and shall, if the other party to the dispute so demands, be referred to the Permanent Court of International Justice, whose decision shall be final.

As already pointed out, the provisions of the Geneva Convention upon which the German Government relied in support of their claim are contained in articles which follow Article 72, and in the course of the proceedings before the Court the Polish agent took the point that the Court had no jurisdiction to entertain the present Application. This point was not raised by way of preliminary objection, but was first formulated in the Polish Government's written Rejoinder, and subsequently repeated in oral argument. In reply, the German agent contended, *inter alia*, that the League's guarantee was not confined to the articles preceding Article 72. This argument was rejected by the Court, in view of the plain terms of that provision, but it held that the Polish Government had implicitly accepted the jurisdiction of the Court in the present case by its conduct in the proceedings. The following passages in the judgment may be cited: "There seems to be no doubt that the consent of a state to the submission of a dispute to the Court may not only result from an express declaration, but may also be inferred from acts conclusively establishing it. It seems hard to deny that the submission of arguments on the merits, without making reservations in regard to the question of jurisdiction, must be regarded as an unequivocal indication of the desire of a state to obtain a decision on the merits of the suit. And, as the Court has already observed, the submissions of the Polish Counter-Case aim at a decision on the merits," . . . "If in a special case the Respondent has, by an express declaration, indicated his desire to obtain a decision on the merits and his intention to abstain from raising the question of jurisdiction, it seems clear that he cannot, later on in the proceedings, go back upon that declaration. This would not hold good only

if the conditions under which the declaration had been made were such as to invalidate the expression of intention, or if the Applicant had, in the subsequent proceedings, essentially modified the aspect of the case, so that the consent, given on the basis of the original claim, could not reasonably be held to apply to the claim in the form which it now assumes. And, in the Court's opinion, there is no reason for dealing otherwise with cases in which the intention of submitting a matter to the Court for decision has been implicitly shown by the fact of arguing the merits without reserving the question of jurisdiction."

With regard to the merits, the Court was of opinion that Poland was justified in construing the relevant part of the Geneva Convention as meaning that the question whether a person does or does not belong to a minority is a question of fact, and not solely one of subjective intention, as contended by the German Government. Thus Article 131 does not contemplate a mere statement of a wish that the instruction of a child should be given in the minority language. The declaration must, on principle, refer to the existence of a fact, but this does not exclude the possibility, when appreciating those facts, of properly taking into account a subjective element. It is not always clear and beyond doubt what is to be understood as a person's language, particularly in the very special conditions prevailing in Upper Silesia. Where the declaration states that the child only speaks Polish, or where there is no declaration, the Polish Government may refuse to admit to the minority schools, but if a declaration has been made that the child's language is German it must always be respected. With regard to Article 131 as well as Article 74 the prohibition against verification or dispute of declarations does not cease to apply even in cases where it appears that the declaration is not in accordance with the facts. It is recognized that the prohibition of any verification may lead to certain persons who, in fact, do not belong to a minority having to be treated as though they did, but, in the opinion of the Court, that is a consequence which the contracting parties accepted in order to avoid the much greater disadvantages which would arise from verification or dispute by the authorities.

The Court accordingly gave judgment "that Articles 74, 106, and 131 of the Germano-Polish Convention of May 15, 1922, concerning Upper Silesia, bestow upon every national the right freely to declare according to his conscience and on his personal responsibility that he does or does not belong to a racial, linguistic, or religious minority and to declare what is the language of a pupil or child for whose education he is legally responsible; that these declarations must set out what their author regards as the true position in regard to the point in question and that the right freely to declare what is the language of a pupil or child, though comprising, when necessary, the exercise of some discretion in the appreciation of circumstances, does not constitute an unrestricted right to choose the language in which instruction is to be imparted or the corresponding school; that nevertheless the declaration contemplated by Article 131 of the Convention, and also the question whether a person does or does not belong to a racial, linguistic, or religious minority, are subject to no verification, dispute, pressure, or hindrance whatever on the part of the authorities."

The judgment of the Court was adopted by eight votes to four, Judges Huber, Nyholm, and Negulesco dissenting on the question of jurisdiction, and Dr. Schücking, German National Judge, on the merits. Count Rostworowski, the Polish National Judge, was of the majority.

JUDGMENT No. 13. DELIVERED SEPTEMBER 13, 1928.¹*The Factory at Chorzow: Claim for Indemnity (Merits).*

THIS is the fifth judgment relating to the Chorzow factory in Upper Polish Silesia, the first three decisions having been noticed in the *Year Book* for 1926 (Judgment No. 6), 1927 (Judgment No. 7), and 1928 (Judgment No. 8), and the fourth (Judgment No. 11) above. In the present case, Germany's claim for compensation in respect of the Polish Government's seizure of the factory was considered on the merits, in consequence of the Court's decision (Judgment No. 8) that it possessed jurisdiction to do so. The earlier decisions having established that Poland had committed a breach of her international obligations under the Geneva Convention by taking possession of the factory in virtue of the Polish Law of July 14, 1920, and that reparation was due therefor, the purpose of these proceedings was to determine the nature and *quantum* of the indemnity.

It was common ground that the property could not be restored in kind, and the German Government claimed: (1) 58,400,000 Reichsmarks, plus 1,656,000 Reichsmarks (representing the value of the working capital), plus interest at 6 per cent. on these two sums from July 3, 1922 (the date of the seizure of the factory), till judgment, in respect of the damage suffered by the Oberschlesische Co.; (2) 20,179,000 Reichsmarks for the damage caused to the Bayerische Co.; (3) that until June 30, 1931, no nitrated lime or nitrate of ammonia produced at the Chorzow factory should be exported to Germany, to the United States of America, to France, or to Italy.

The Polish Government submitted (1) that the claim in respect of the Oberschlesische should be dismissed; and that, in any case, the German Government should, in the first place, hand over to the Polish Government the whole of the shares of the Oberschlesische; (2) as regards the Bayerische, that the claim for compensation in respect of the past should be limited to 1,000,000 Reichsmarks, and that *pro futuro* an annual payment of 250,000 for the years 1928-41 should be awarded; (3) that the claim relating to prohibition of export should be dismissed.

In the course of the proceedings divergences of view between the parties were revealed as to the nature and scope of the Application. The German Government maintained that the indemnity was due to itself, by reason of the violation of its own rights, and not as representative of the two companies, whereas the Polish Government contended that this method of regarding the question involved a modification of the subject of the dispute, which had been defined by Germany as the obligation to compensate the companies. The Court points out, in its judgment, that the present application is explicitly and exclusively based on Judgment No. 7, which declared that the attitude of Poland in respect of the two companies was not in conformity with Article 6 and the following articles of the Geneva Convention. The matter was exclusively a dispute between states, and the Court had declared itself competent to pass upon the claim for reparation because it regarded reparation as the corollary of the violation of the obligations resulting from an engagement between states. Moreover, this view of the matter was in conformity with the general character of an international tribunal which, in principle, has cognizance only of interstate relations. The judgment then proceeds to make the following general observations:

¹ See a note on this case, *ante*, p. 222.

"It is a principle of International Law that the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured state have suffered as a result of the act which is contrary to International Law. This is even the most usual form of reparation; it is the form selected by Germany in this case and the admissibility of it has not been disputed. The reparation due by one state to another does not, however, change its character by reason of the fact that it takes the form of an indemnity for the calculation of which the damage suffered by a private person is taken as the measure. The rules of law governing the reparation are the rules of International Law in force between the two states concerned, and not the law governing relations between the state which has committed a wrongful act and the individual who has suffered damage. Rights or interests of an individual the violation of which rights causes damage are always in a different plane to rights belonging to a state, which rights may also be infringed by the same act. The damage suffered by an individual is never therefore identical in kind with that which will be suffered by a state; it can only afford a convenient scale for the calculation of the reparation due to the state."

The Court states that three fundamental questions arise:

- (1) The existence of the obligation to make reparation.
- (2) The existence of the damage which must serve as a basis for the calculation of the amount of the indemnity.
- (3) The extent of this damage.

As to (1) there is no dispute. It is a principle of International Law, and indeed a general conception of law, that any breach of an engagement involves an obligation to make reparation. The question whether such a breach has in fact taken place is *res judicata*, having been established by Judgment No. 7.

As regards (2), the question whether damage has resulted from the wrongful act is in no wise settled by the Court's previous decisions. It is necessary for the Court to ascertain whether the two companies have in fact suffered damage as a consequence of the Polish Government's attitude. Poland admits the existence of damage in the case of the Bayerische—the parties differing only as to its extent and the mode of reparation—but in the case of the Oberschlesische the existence of any damage calling for reparation is denied. The fact of the dispossession of the Oberschlesische is in no way disputed, but the Polish Government argues that notwithstanding this the company has suffered no damage, because the right of ownership claimed by the company was null and void or subject to annulment, and, secondly, because the contract of December 24, 1919 (whereby all the shares of the Oberschlesische were taken over by the Treuhand Company and subjected to a lien in favour of the Reich), attributed to the Reich rights and benefits so considerable that any possible damage would not materially affect the Company.

As to (3) the parties were at issue both as to the amount and method of payment of any compensation which might be awarded.

Dealing with the question whether the Oberschlesische had suffered damage, the Court first of all enunciates the general principle, accepted in the practice of arbitral tribunals, that only the value of the property, rights, and interests which have been affected must be taken into account, with the result, on the one hand, of excluding from the damage to be estimated, injury to third parties, and, on the other hand, of not excluding the amount of debts and other obligations for which the injured party is responsible. The damage suffered by the Oberschlesische in

respect of the Chorzow undertaking is therefore equivalent to the total value—but no more—of the property, rights, and interests of the company in that undertaking, without deducting liabilities.

The Court goes on to consider in detail the various arguments advanced by Poland in support of her submission that the Oberschlesische was not the lawful owner of the Chorzow factory, and reaches the conclusion that they are not well founded. The further pleas that the rights of the Reich in the undertaking should be eliminated and the shares of the Oberschlesische handed over to the Polish Government are also rejected.

The right to compensation being thus established as regards the Oberschlesische no less than the Bayerische, the Court proceeds, in the following important passage, to lay down the guiding principles according to which the amount should be determined:

“The action of Poland which the Court has judged to be contrary to the Geneva Convention is not an expropriation—to render which lawful only the payment of fair compensation would have been wanting; it is a seizure of property, rights and interests which could not be expropriated even against compensation, save under the exceptional conditions fixed by Article 7 of the said Convention. As the Court has expressly declared in Judgment No. 8, reparation is in this case the consequence not of the application of Articles 6 to 22 of the Geneva Convention, but of acts contrary to those articles.

“It follows that the compensation due to the German Government is not necessarily limited to the value of the undertaking at the moment of dispossession, plus interest to the day of payment. This limitation would only be admissible if the Polish Government had the right to expropriate, and if its wrongful act consisted merely in not having paid to the two companies the just price of what was expropriated; in the present case, such a limitation might result in placing Germany and the interests protected by the Geneva Convention, on behalf of which interests the German Government is acting, in a situation more unfavourable than that in which Germany and these interests would have been if Poland had respected the said Convention. Such a consequence would not only be unjust, but also, and above all, incompatible with the aim of Article 6 and following articles of the Convention—that is to say, the prohibition, in principle, of the liquidation of the property, rights and interests of German nationals and of companies controlled by German nationals in Upper Silesia—since it would be tantamount to rendering lawful liquidation and unlawful dispossession indistinguishable in so far as their financial results are concerned.

“The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to International Law.”

The Court points out that the Chorzow undertaking is an economic unity, as shown by the fact that the interests possessed by the two companies are inter-

dependent and complementary; it follows that they cannot simply be added together without running the risk of the same damage being compensated twice over. The proper course appeared to be to award a lump sum corresponding to the value of the undertaking. Faced with the task of determining this sum, the Court considered the data supplied by the parties insufficient and accordingly decided to hold an expert inquiry, in conformity with Article 50 of the Statute, to which the following questions would be referred:

1. (a) What was the value, on July 3, 1922, expressed in Reichsmarks current at the present time, of the undertaking for the manufacture of nitrate products of which the factory was situated at Chorzow in Polish Upper Silesia, in the state in which that undertaking (including the lands, buildings, equipment, stocks, and processes at its disposal, supply and delivery contracts, goodwill and future prospects) was, on the date indicated, in the hands of the Bayerische and Oberschlesische Stickstoffwerke?

(b) What would have been the financial results, expressed in Reichsmarks current at the present time (profits or losses), which would probably have been given by the undertaking thus constituted from July 3, 1922, to the date of the present judgment, if it had been in the hands of the said Companies?

2. What would be the value at the date of the present judgment, expressed in Reichsmarks current at the present time, of the same undertaking (Chorzow) if that undertaking (including lands, buildings, equipment, stocks, available processes, supply and delivery contracts, goodwill and future prospects) had remained in the hands of the Bayerische and Oberschlesische Stickstoffwerke, and had either remained substantially as it was in 1922 or had been developed proportionately on lines similar to those applied in the case of other undertakings of the same kind, controlled by the Bayerische, for instance, the undertaking of which the factory is situated at Piesteritz?

The Court rejected the German claim relating to prohibition of export to certain countries during a specified period.

Finally the Court declined to give judgment upon a further German claim asking for a declaration that the Polish Government was not entitled to set off against the claim for indemnity a claim in respect of social insurance in Upper Silesia, or make use of any other set-off, holding that it had no jurisdiction to do so.

The fixing of the amount of compensation was reserved for a future judgment, to be given after receiving the report of the experts appointed by the Court.

Lord Finlay, M. Nyholm, and M. Ehrlich, Polish National Judge, dissented. Lord Finlay's dissent was based, as appears from his separate opinion, upon the view that, Germany having abandoned her claim to restitution, the damages for the wrongful act of the Polish Government should, according to the general principles of International Law, be based upon the value of the undertaking at the time of the seizure, together with interest on that value until the date of payment. A party who had given up his right to *restitutio in integrum* was not entitled to claim damages on the footing of the enhanced value, if any, that he would have got if he had pressed his claim for restitution. The fact that damages so assessed might amount to no more than the amount which the Polish Government would have had to pay if it had been able to expropriate the undertaking in conformity with the Geneva Convention was immaterial.

The parties informed the Court in December last that the dispute had been settled by agreement, and all further proceedings were accordingly discontinued.

ADVISORY OPINION NO. 15. DELIVERED MARCH 3, 1928

Jurisdiction of the Courts of Danzig.

THIS matter was referred to the Court by a Resolution of the Council of the League, dated September 22, 1927, in consequence of an appeal to the Council by the Government of the Free City of Danzig against a decision of the High Commissioner. The question submitted to the Court for its advisory opinion was whether that part of the decision which held that the clauses of the Danzig-Polish Agreement of October 22, 1921, were not to be regarded as provisions constituting the contract of service of the Danzig railway officials who had passed into the service of the Polish Railways Administration, and therefore could not give ground for a personal action in the Danzig Courts, was legally well-founded or not.

The above-mentioned Agreement of October 22, 1921, was entered into as part of the arrangements made between Poland and the Free City for the purpose of transferring to Poland the control and administration of the railway system within the Free City, in pursuance of Article 104 of the Treaty of Versailles, and it contained detailed provisions regarding the terms and conditions of service of the transferred railway officials.

A number of actions had been brought in the Danzig Courts by railway officials against the Railways Administration, based upon the provisions of the Agreement, which those Courts held themselves competent to adjudicate upon, although the Polish Government objected to their jurisdiction.

Poland contended before the Permanent Court of International Justice that this instrument, being an international agreement between Poland and the Free City, created rights and obligations between the contracting parties only, and, failing its incorporation into Polish national legislation, could not create direct rights and obligations for the individuals concerned. Danzig, on the other hand, contended that the Agreement, though international in form, was intended by the contracting parties to constitute part of the series of provisions establishing the legal relationship between the Railways Administration and its employees.

It is observed in the Court's opinion that whilst in accordance with a well-established principle of International Law an international agreement cannot, as such, create direct rights and obligations for private individuals, it cannot be disputed that the very object of an international agreement, according to the intention of the contracting parties, may be the adoption by the parties of some definite rules creating individual rights and obligations and enforceable by the national courts. The intention of the parties, which is to be ascertained from the contents of the agreement, taking into consideration the manner in which it has been applied, is decisive.

Adopting this principle of interpretation the Court examined in detail the provisions of the Agreement in question and arrived at the conclusion that, in the intention of the contracting parties, the relations between the Polish Railways Administration and the Danzig officials were to be governed by the Agreement, the provisions of which form part of the "contract of service", and that, consequently, the Danzig officials have a right of action against the Administration for the recovery of pecuniary claims based upon it.

The Court held that Poland was bound to recognize the jurisdiction of the

Danzig Courts in respect of such claims by virtue of a decision of the High Commissioner of September 5, 1921, which was binding upon her. If it were argued that those Courts could not apply the provisions of the Agreement of October 22, 1921, because they were not duly inserted in the Polish national law, the answer would be that Poland, at any rate, could not avail herself of an objection which would amount to relying upon the non-fulfilment of an obligation imposed upon her by an international engagement.

In the result the Court unanimously answered the question referred to it in the negative. It is noteworthy that this was the first case in which, in accordance with the new rule adopted by the Court on September 7, 1927, national judges sat in an advisory case.

ADVISORY OPINION NO. 16. DELIVERED AUGUST 28, 1928

Interpretation of the Greco-Turkish Agreement of December 1, 1926.

THIS matter was referred to the Court by a Resolution of the Council of the League dated June 5, 1928, at the request of the Mixed Commission for the Exchange of Greek and Turkish Populations. As appeared from a letter dated February 4, 1928, from the President of the Commission to the Secretary-General of the League, differences of opinion had arisen among the members of the Commission as to the interpretation of Article IV of the Final Protocol of the Greco-Turkish Agreement concluded on December 1, 1926, and the advisory opinion of the Court was desired upon the question. Before giving effect to the request of the Commission, the Council sought and obtained the consent of the Greek and Turkish Governments to the proposed procedure. Both Governments were represented in the proceedings before the Court and fully explained their respective points of view.

The Greco-Turkish Agreement in question entrusted the application of certain provisions of the Treaty of Lausanne and its Annexed Protocol IX to the Mixed Commission, and Article IV of the Final Protocol of the Agreement provided as follows:

Article IV. "Any questions of principle of importance which may arise in the Mixed Commission in connexion with the new duties entrusted to it by the Agreement signed this day and which, when that Agreement was concluded, it was not already discharging in virtue of previous instruments defining its powers, shall be submitted to the President of the Greco-Turkish Arbitral Tribunal sitting at Constantinople for arbitration. The arbitrator's awards shall be binding."

The question upon which the opinion of the Court was sought was stated to be the interpretation of this article "so far as it concerns the conditions for appeals to the arbitrator".

The Turkish Government submitted that the right to resort to proceedings before the President of the Mixed Arbitral Tribunal may be exercised by the Mixed Commission as such, but may not be exercised separately or jointly by the two states signatories of the Agreement, except after a vote by the Commission. The Greek Government contended that the Mixed Commission, as such, had no right to refer a matter to the arbitrator; neither had it the right to settle the question of the jurisdiction of the arbitrator in each case, this being reserved to the arbitrator himself; and that the two parties had the right jointly or severally

to have recourse to the arbitrator, without such recourse being subject to a previous decision of the Mixed Commission.

The Court points out in its opinion that Article 72 of the Rules of Court lays down that requests for advisory opinions "shall contain an exact statement of the question upon which an opinion is required", which condition is not fulfilled in the present case. The Court considered that it was essential that it should determine precisely what the question was and formulate an exact statement of it, in order more particularly to avoid dealing with points of law upon which it was not the intention of the Council or the Commission to obtain its opinion, and stated that in the present instance it was possible for it to do this, owing to the relatively simple nature of the case; this, however, might not always be so.

After remarking that the word "appeals" is not strictly accurate, inasmuch as the arbitrator referred to in Article IV is not in the position of a superior court placed above the Mixed Commission, the Court observes that the conditions for the reference or submission to him (which is what is meant) are clearly defined by the actual terms of the article, so that in regard to this point no difference of opinion can be presumed to exist. According to the article itself in order that a question may be submitted for arbitration to the President of the Greco-Turkish Mixed Arbitral Tribunal it is necessary (1) that it should have arisen within the Mixed Commission; (2) that it should have arisen in connexion with the new duties entrusted to it; (3) that it should be a question of principle; and (4) that it should be of importance. There is no doubt that only when these four conditions are fulfilled can a matter be referred to the President of the Mixed Arbitral Tribunal.

From a careful examination of the documents and oral statements submitted to it, the Court came to the conclusion that the differences of opinion which had resulted in the request for its opinion related not to the question what are the conditions to which the submission of a question to the arbitrator is subject, but to the question for whom it is to decide whether these conditions are fulfilled and by whom a question may be referred to the arbitrator. The Court, therefore, following the precedent afforded by its Advisory Opinion No. 3, altered the terms of the question, and formulated it as follows:

"(1) Is it for the Mixed Commission for the Exchange of Greek and Turkish Populations to decide whether the conditions laid down by Article IV of the Final Protocol annexed to the Agreement concluded at Athens on December 1, 1926, between the Greek and Turkish Governments, for the submission of the questions contemplated by that article to the arbitration of the President of the Greco-Turkish Mixed Arbitral Tribunal at Constantinople, are or are not fulfilled? or is it for the arbitrator contemplated by that article to decide this?

(2) The conditions laid down by the said Article IV having been fulfilled, to whom does the right of referring a question to the arbitrator contemplated by the article belong?"

The Court states that in its eyes the meaning of Article IV is clear. It contains no express provision designed to settle the question by whom or when the questions with which the instrument deals may be referred to the President of the Greco-Turkish Mixed Arbitral Tribunal. But from the very silence of the article on this point, it is possible and natural to deduce that the power to refer a matter to the arbitrator rests with the Mixed Commission, for, according to its very terms, Article IV contemplates questions arising in the course of the deliberations

of the Commission and no others. That being so, it is clear—having regard amongst other things to the principle that, as a general rule, any body possessing jurisdictional powers has the right in the first place itself to determine the extent of its jurisdiction—that questions affecting the extent of the jurisdiction of the Mixed Commission must be settled by the Commission itself without action by any other body being necessary. It follows logically that the Mixed Commission itself must also decide whether the various conditions required to make such reference possible are fulfilled.

If there is a difference of opinion between the members of the Commission the general rule governing the performance of its duties must be followed and the decision must be taken by a majority vote.

As regards the arbitrator, once he is satisfied that a question submitted to him has been referred to him by a decision of the Mixed Commission, he must decide the question so submitted and may not revert to the question whether the conditions required by Article IV have been fulfilled.

The Court unanimously answered the question formulated above as follows:

“(1) It is for the Mixed Commission for the Exchange of Greek and Turkish Populations alone to decide whether the conditions enumerated in Article IV of the Final Protocol annexed to the Agreement concluded at Athens on December 1, 1926, between the Greek and Turkish Governments, for the submission of the questions contemplated by that article to the President of the Greco-Turkish Mixed Arbitral Tribunal sitting at Constantinople, for arbitration, are or are not fulfilled.

(2) The conditions contemplated by the said Article IV having been fulfilled, the right to refer a question to the arbitrator contemplated by that article belongs to the Mixed Commission alone.”

It may be mentioned that the two interested Governments waived their right to appoint national judges to sit with the Court in the consideration of this case.

ALEXANDER P. FACHIRI.

DECISIONS OF NATIONAL TRIBUNALS INVOLVING POINTS OF INTERNATIONAL LAW

DIGEST OF THE DECISIONS OF THE ENGLISH COURTS DURING THE YEAR 1927

*Introductory Note.*¹

THE decision of the House of Lords in *Engelke v. Musmann* (1), though the *ratio decidendi* is a principle of International Law of which the implications are important and interesting in connexion with the question of diplomatic immunity,² is primarily a decision as to the procedure of the English courts, and it is from this point of view that it will be considered here. The decision was that the status of any member of a foreign embassy is a matter of which the Court takes judicial cognizance and that, where in any case the Court is not fully informed, the Court may have recourse to the proper source of information, which is the Foreign Office, and that where a statement as to the status of any such person is made to the Court on the authority of the Secretary of State for Foreign Affairs it is conclusive evidence which must be accepted by the Court (see Lord Warrington at pp. 457-8 of the report in [1928] A.C.).

The House based their conclusion on the ground that it is a necessary part of His Majesty's prerogative in the conduct of foreign affairs and his relations with foreign states to accord or refuse recognition to any person as a member of a foreign ambassador's staff, and that diplomatic status is created by such recognition (see Lord Phillimore at p. 451 and Lord Warrington at p. 457); and that consequently, since the matter depended on the recognition of the person concerned by the Foreign Office on behalf of His Majesty, a statement by the Foreign Office as to such person's status was a statement by the Secretary of State of what he had himself done on behalf of His Majesty, and related to a matter within the direct knowledge of the Foreign Office and was not hearsay evidence of matters of which the Foreign Office had been informed by third parties, nor an attempt on the part of the Executive to interfere with the Judiciary (see Lord Phillimore at p. 451 and the other Law Lords *passim*) and that further if, in the face of such evidence of recognition by His Majesty, the courts were to consider other evidence and come to a different conclusion thereon, there would be apparent a conflict between the executive and the judiciary in a sphere within the prerogative of the Crown which could not possibly inure to the public good (see Lord Buckmaster at p. 447).

This decision follows a number of recent cases in which the doctrine of judicial

¹ The numbers in brackets following the names of cases in the introductory note refer to the number of the case in the digest which follows. All cases reported in the Law Reports and contemporary reports are reviewed. The decision of the Court of Appeal in the case of *Josef Inwald Actiengesellschaft v. Pfeiffer*, reviewed in the *Year Book* for 1928 at pp. 168 and 176, was confirmed by the House of Lords (44 T.L.R. 352). As the judgments of the House of Lords do not introduce any new matters of principle, no further review of this case is given here.

² This aspect of the case is discussed in an article by Sir Cecil J. B. Hurst at p. 1, *supra*.

notice has been applied and the respective functions of the executive and judiciary further defined in relation to the prerogative of the Crown relating to the conduct of foreign affairs. In these cases exactly similar principles were applied where the issue was whether a person was the head of an independent foreign state (*Mighell v. Sultan of Johore*), whether a government was in fact the government of an independent foreign state (*Luther, &c. v. Sagor*), and whether a community was an independent foreign state (*Duff Development Co. v. Government of Kelantan*). In the *Fagernes* case it was held that these principles also applied where the issue was the geographical limits of the jurisdiction of the Crown.

Indeed in this case also it appears to have been common ground between the parties that these principles would apply if the issue had been the status of the head of a foreign mission. The whole case for the plaintiffs was that they did not apply to the staff of an ambassador, and that in the case of such a person the onus was on him to prove, by evidence in the ordinary way, that he actually exercised functions entitling him to privilege and that, since the defendant's functions were at any rate largely consular and the case was near the line, his affidavit evidence should not be admitted unless the plaintiffs had the opportunity of testing it by cross-examination, and that, so far as the functions actually performed by him were concerned, the Foreign Office had no direct knowledge of them. This view was adopted by the majority of the Court of Appeal. It proceeds on the basis that the functions performed, and not recognition by the Crown, are the source of the diplomatic status of the staff of foreign ambassadors, but the Master of the Rolls in the Court of Appeal and the House of Lords unanimously affirmed that recognition by the Crown is the basis of diplomatic status.

There has been a disposition to consider this decision as a new departure. But given the admitted application of the principle in the case of the head of a mission, on authority which goes back to Lord Mansfield, and its application to a member of the staff of a mission in *Macartney v. Garbutt* and in a number of American cases, there does not seem to be much justification for this criticism. The explanation of the considerable line of cases relied on by the majority of the Court of Appeal, where the question of status has been considered by the Court on affidavit evidence of the functions performed, is given by Lord Hanworth M.R. and Lord Phillimore (p. 452). In those cases the Foreign Office had not intervened. The Crown was not bound to give any statement as to a person's diplomatic status, negative or positive. In such a case the Court, as in other matters of which it takes judicial cognizance, where the best information is lacking, is left to decide the matter on such other evidence as it can obtain, and if it finds that a person is performing the requisite functions it may hold him to possess diplomatic status on such evidence. It would appear, though this point was not mentioned in the judgments, that a statement from the Foreign Office that a person was not recognized would be equally conclusive, but in the absence of any statement and in the face of evidence of the performance of functions the Court may presume the recognition or at any rate readiness to grant recognition on the part of the Crown on the facts being elucidated.

As the Law Lords point out, diplomatic immunity entitles the holder to freedom from the annoyance of litigation and, if the Crown recognizes a person as possessing diplomatic status, it has undertaken that he shall be so free, but if the person whom the Crown has recognized is compelled to litigate to prove his status the immunity guaranteed him by the Crown has been violated. The Crown must

have the right to protect him. This right the House of Lords affirmed. The majority of the Court of Appeal disputed it.

If a person has not been recognized by the Crown, and, as Lord Phillimore states, it appears probable that in many of the old cases relating to servants of foreign ministers the Crown had no knowledge of them, the Crown has undertaken no such obligation and the person concerned has no complaint if he is put to trouble.

Two other points elucidated in this case are worth notice. First, though the statements of the Crown are conclusive evidence of status, it is for the courts to decide whether immunity flows from such status. It may be that a person holding diplomatic status is not entitled to immunity because he has engaged in trade. Secondly, the diplomatic list prepared under the Statute of Anne for sheriffs, though evidence of recognition at the time the name is put on the list, is not conclusive evidence of status at the time of the action, because such person may possibly have since ceased to hold his office.

The case of *In re Visser* (2) is an authority that the English courts cannot entertain a claim brought by or on behalf of a foreign sovereign for taxes or duties due under the revenue laws of a foreign state. So far as foreign municipal rates and taxes are concerned there was already a decision to the same effect, but in respect of foreign state taxes there were only *obiter dicta*. The judgment in this case shows, however, that it is not quite true to say broadly, as it is often stated, that the English courts "take no notice of the revenue laws of a foreign state". Tomlin J. expressed the view that, where a foreign revenue law invalidated a contract which was governed by the law of that country, the English courts could not hold a contract, invalid by its proper law, a valid and enforceable contract.

The case of the *First Russian Insurance Co. v. London and Lancashire Insurance Co.* (3) forms an addition to the now considerable series of English decisions on the situation created by the nationalization decrees of the Soviet Government. To a great extent the judgment consists of findings of the English court as to the effect of such legislation, which findings are set out in the digest of the case, in view of the general international interest of the matter. It is interesting, moreover, to notice the growth of the natural tendency to follow the decisions in previous cases as to the effect of such decrees almost as if they were authorities on a point of law, whereas strictly the effect of foreign laws is a matter of fact to be decided afresh in each case on the evidence of experts, and a previous decision on a matter of fact in a case between different parties is in no way an authority in another case. However, two principles of Private International Law, which are worth notice, emerge from the judgment in this case:

(1) If a debt situated in a foreign country is extinguished by the law of that country it ceases to exist anywhere.

(2) If a company incorporated under the law of a foreign country is deprived by the law of that country of the power to engage in a certain kind of business anywhere, so that such business becomes, so to speak, *ultra vires* the company altogether, then it cannot validly carry on such business or make contracts for the purpose of such business by a branch or through agents in another country. Its powers are governed by the law of the country where it is incorporated.

These principles are the basis on which the judgment in the case proceeds, though owing to the conclusions come to as to the effect of the foreign law in question they are not the grounds of the decision in the case.

In a note on the "principle of personal law" in the last number of the *Year*

*Book*¹ attention was drawn to the striking manner in which in recent years the English courts have tended to apply the principle that, in all questions of personal status, the law of the domicile applies, and in cases where the issue is one of status the courts of the domicile alone have jurisdiction. The case of *H. v. H.* (4) marks a still further step in the same direction, in that an exception, in the matter of divorce, which had on the authority of certain dicta been supposed to exist, is now overruled. The cases of *Lord Advocate v. Jaffrey* in 1921 and *Attorney-General for Alberta v. Cook* in 1926 established that even if a wife (i) had been deserted by her husband, or (ii) had obtained a judicial separation from him, nevertheless there was still only one matrimonial domicile, that of the husband, and the courts of that country alone had jurisdiction to divorce. Two exceptions previously alleged to exist were thus done away with, but, as pointed out in the digest of the latter case in the *Year Book*,² the Privy Council did not express any opinion on the slightly different point whether, in accordance with the dicta in *Armstrong v. Armstrong* and certain other cases, "the courts may by estoppel or like device ensure that" a husband who has deserted his wife or been judicially separated from her and has then gone to a foreign country "should not resort to a jurisdiction other than that in which both were domiciled and invoke its powers to change the status of the spouse left resident in the original place of domicile". Lord Merrivale has now held that the courts have no such power and that these dicta are not good law, and in support of this conclusion he relied *inter alia* on the inconsistency of the supposed rule with the general principle above mentioned, seeing that this rule would operate in some cases to give jurisdiction in divorce to a court which was no longer that of the domicile. In divorce it appears that now only one possible exception still survives, namely that recognized by cases like *Stathos v. Stathos*, where an English marriage has been declared a nullity in the courts of the domicile, and even that exception may lose its *raison d'être* if it is held that the decision of the House of Lords³ in *Salvesen's* case covers marriages celebrated in England, as it may well do, for in such a case the English courts have only to recognize the effect of the decree of nullity of the courts of the domicile.

In the case of *In re Schnapper*⁴ the English court ordered the payment to a person of eighteen years domiciled in Germany, who had come of age under German law, of money, the proceeds of a legacy which had been paid into court some years before, although the legatee had still not reached the age of majority in English law, applying in this case the law of the domicile to determine the question of capacity. It is perhaps only in relation to contracts concluded by a person elsewhere than in the country of his domicile that there is any real doubt as to the law applicable to determine this question.

Raeburn v. Raeburn (5) decides a small point. It had already been fully established that in suits for judicial separation either domicile without residence or residence without domicile were sufficient to found jurisdiction, though there are expressions in the judgments of the Court of Appeal in *Eustace v. Eustace* which show that domicile must be regarded as the primary source of jurisdiction as the matter is one of status, and a decree based on residence only must be regarded as a local measure not necessarily entitled to recognition abroad. The *Raeburn* case merely decides that, where residence exists, the personal presence of the

¹ 1928 at p. 126.

³ See *Year Book*, 1928, at p. 169.

² 1927 at p. 195.

⁴ [1928] Ch. 4. The case is not digested.

respondent within the jurisdiction at the time of the filing of the petition is not necessary and that the possession of a house in the jurisdiction by the respondent, to which he is always entitled to go, constitutes such residence although he is not at the time living at such house but at another home outside the jurisdiction.

The case of *Ellerman Lines Ltd. v. Reed* (6) is an illustration of the powers and practice of the English courts in respect of the granting of injunctions restraining persons from taking proceedings in foreign courts. The power, of course, rests upon the possession of jurisdiction on the part of the English courts over the persons against whom the injunction is directed. The injunction is *in personam*. The defendants were British subjects and this fact is mentioned in the judgment of Scrutton L.J., but it would seem that the presence of the defendants within the jurisdiction rather than their nationality is the basis of such jurisdiction.

Such an injunction is granted when the foreign proceedings which the defendant is restrained from taking are, or would be, in breach of covenant or otherwise vexatious or unconscionable. The particular point, not hitherto decided, which was covered in this case was that such an injunction can be granted to restrain the enforcement abroad of a foreign judgment already obtained by fraud and in breach of contract, as well as against the taking of such proceedings to obtain a judgment. Since the injunction is directed only against the defendants it implies no claim to jurisdiction over any foreign court, and, since its basis was the fraud practised on the court which granted it, it implies no criticism of that court.

The case of the *Janera* (7) is a case which throws some light on the practice of the English courts with regard to *lis alibi pendens*. The position is different in regard to an action which a plaintiff has a legal right to bring in England (i.e. when, for instance, he is able to find the defendant in this country and serve proceedings on him there) from that when the plaintiff has no such legal right and the matter is within the full discretion of the court (i.e., for instance, when leave to serve out of the jurisdiction is required). In the latter case the court has a full discretion to take into consideration the question whether England or the other country, where proceedings are also being taken, is the *forum conveniens*. In the former case the English proceedings can only be set aside if they can be held to be vexatious—a stronger requirement—and the judge held that the fact that a person had been made a defendant in another country did not make it vexatious for him to commence a suit as plaintiff in respect of the same matter in England.

The decision in the case of *Jacobson v. Frachon* (8), though not reported in the Law Reports, is of considerable interest with regard to the practice of the English courts in respect of foreign judgments *in personam*.

Such judgments are recognized by the English courts as final and conclusive between the parties to the foreign proceedings, both in matters of fact and of law, of the merits of the case with which they deal, and will estop a party from instituting proceedings in England in respect of the same subject, the matter being regarded as *res judicata*, and, if for a sum of money certain, they are enforceable in England by an action on the judgment. This rule is subject to certain exceptions, of which one, the extent of which was considered in this case, is "where the proceedings in the foreign court were contrary to natural justice".

The judgment in this case shows how very narrow this exception is. It is confined to objections to the procedure of the foreign court and does not cover

objections to the merits of the decision, although the English court may be of the opinion that that decision was clearly based on a wrong view of the facts or of the law. The decision in this case shows, moreover, that even in regard to objections to the procedure, the exception only applies where there has not been a proper hearing of the case and a party had insufficient notice of the proceedings or insufficient opportunity of presenting his case. Further, it is not sufficient in order to bring a case within this exception that there should be some element in the procedure followed in the case which the English courts think open to serious criticism on the ground that in some part of the proceedings there was an insufficient hearing and a party was unable to produce his evidence, if it was still open to such party to raise these objections in the foreign court and that court had power, if it found them valid, to give effect to them and order a rehearing of this part of the proceedings. For if the foreign court, after hearing him, wrongly, in the opinion of the English courts, dismisses his objections, then it is not really the procedure which is the source of the complaint against the foreign judgment, but the decision of the foreign court rejecting these objections, and consequently the complaint relates to the merits of the decision.

The case of *In re Achilopoulos* (9) illustrates some points concerning the practice of the English courts with regard to the administration of the estate in England of a person dying domiciled abroad. In such a case it is, of course, necessary that an English grant should be obtained to deal with the English assets, but the English administration is regarded as being in a sense ancillary to the administration in the country of the domicile, and the executors or administrators under the law of the domicile are generally recognized as having a first claim to a grant to themselves or their attorneys of administration of the English estate. One of the two points decided in this case, which shows the ancillary character of the English administration in such cases, was that the duties of the English administrators are confined to taking the proper steps to ascertain and discharge the English debts and any foreign debts of which they have notice, and that when this has been done the surplus may be handed over to the administrators by the law of the domicile, who are the persons responsible for payment of the foreign debts. The English administrators need not take steps to ascertain such foreign debts. The second point decided was that where, by the law of the domicile, certain persons (heirs) are, by virtue of their interest, automatically charged without the order of any court with the duties imposed in English law on executors or administrators under a grant from the courts, the principles above mentioned apply to such heirs in the same way as they do to an executor appointed under the law of the domicile in cases where, under such law, the practice is similar to that prevailing in English law. It seems curious that this latter point arising out of the conception of the "heir" as automatically, so to speak, both personal representative and next of kin or residuary legatee, which has been adopted from Roman Law by the systems of most Continental countries, had not arisen before in the English courts, but it appears to have been the case.

In re Kooperman (10) shows that where, in proceedings in a foreign country in which he has proper opportunity of defending his interests, a person carrying on business in such country is declared bankrupt and a trustee is appointed to realize his assets for the benefit of his creditors and his property is vested in such trustee, though the order of the foreign court will not vest in the trustee immovable property in England of the bankrupt, the English courts will assist the foreign

trustee in bankruptcy to realize the immovable assets in England by appointing him receiver with power to sell them and deal with the proceeds as trustee in the foreign bankruptcy.

The case of the *Littauer Glove Corporation v. F. W. Millington Ltd.* (11) is interesting as an application to an "artificial person" of the rules determining the competence of a foreign court in actions *in personam* which were laid down in the old cases like *Schibsby v. Westenholz* with regard to natural persons. There are not many decisions with regard to corporations. The rule in question in this case was that which recognizes the competence of the foreign court if the defendant was resident or present in its jurisdiction at the time of the commencement of the action, and it was held that an English company, in order to be resident in a foreign country, must be found to be carrying on business at some definite, and to some extent permanent, place in such country. In the case of an artificial personality the conception of "presence" as distinct from "residence" can hardly be applied.

The case of *R. v. Moscovitch* (12) shows that, where it is necessary to prove in the English courts a marriage celebrated abroad, the validity of that marriage by the civil law of *lex loci celebrationis* must be proved by the evidence of a person skilled in the law of the foreign country concerned, and that it will not be presumed that a religious marriage is so valid on evidence that the ceremony was properly performed according to the religious law in question. The marriage in question was a Jewish marriage celebrated in Imperial Russia, and the case was one of bigamy. An interesting point which was not raised is this:—In order to support a charge of bigamy both the marriages must be monogamous marriages; a polygamous form of marriage does not count as a marriage for this purpose, though it may be recognized as a marriage for others; Jewish law recognizes polygamy, but Jewish marriages celebrated in countries, such as England, where such marriages are recognized as marriages by the *lex loci* and where monogamy is the law, are treated and regarded as monogamous marriages. It is not unlikely that the position was the same in Russia at the relevant time.

1. *Engelke v. Musmann*. [1928] 1 K.B. 90 (C.A.). [1928] A.C. 433.

The plaintiff issued a writ in July 1926 against the defendant, claiming sums due as arrears of rent in respect of a house leased by plaintiff to defendant. The defendant claimed diplomatic privilege and entered conditional appearance and issued a summons for an order to set aside the writ. The plaintiff contested the defendant's diplomatic status. The interlocutory proceedings which then followed were complicated, but on March 4, 1927, the matter came before Shearman J. on appeal from the Master in the following circumstances:

The defendant claimed that the writ should be set aside on the ground that he was in the service of the Ambassador of the German Reich at the Court of St. James's and had been notified as such to the Foreign Office and placed on the diplomatic list issued by the Foreign Office to the Sheriffs under the Diplomatic Privileges Act (7 Anne c. 12). The defendant's application was accompanied by affidavits sworn by the defendant in which it was stated that he held the position of consular secretary on the staff of the German Embassy and was exclusively employed in his duties at the Embassy and was solely responsible to the Ambassador and performed in addition to his duties as consular secretary, which were those performed before the war by the Consul-General, general duties which fall on the staff of the Embassy, such as the coding and decoding of telegrams, and by a certificate from the Foreign Office, signed by an Assistant Under Secretary of State, to the effect that the name of the defendant had appeared on the diplomatic list since June 1921 and since 1924 in the capacity of consular secretary of the German Ambassador.

The German Government in 1919 had amalgamated their diplomatic and consular services and the plaintiff disputed the diplomatic status of the defendant, mainly on the ground that the functions which he performed were consular functions and consuls were not entitled to diplomatic privilege.

Shearman J. held that in the circumstances the defendant should not be allowed to put in these affidavits unless he attended for the purpose of cross-examination upon the facts stated therein, and made an order that he should attend for cross-examination.

Leave was given to the defendant to appeal from this order and the defendant appealed to the Court of Appeal.

At the hearing before the Court of Appeal, the Attorney-General appeared at the request and on behalf of the Secretary of State for Foreign Affairs and stated that the defendant had been appointed a member of the staff of the German Ambassador and had been received in that capacity by the British Government and his diplomatic status had been recognized without any reservation of any sort; that he was engaged as a member of the commercial division of the Embassy and from time to time took part in the general work of the Embassy staff and was responsible in all that he did to the German Ambassador; that he had obtained this information from the Foreign Office which was the authoritative Department of the Government to determine questions as to the status of diplomats, and that he adopted as Attorney-General everything that he had said on behalf of the Foreign Office.

The Attorney-General added that, though the fact that a person's name appeared on the diplomatic list issued by the Foreign Office to the Sheriffs was not conclusive as to such person's status, for the reason *inter alia* that a person might have ceased after the date of the list to hold his appointment and the Court could go behind that list which was not information given to the Court by the Foreign Office. Nevertheless where the Foreign Office was asked by the Court to give information, the information so given was conclusive as to the diplomatic status of the person concerned. It was for the Court to determine whether upon such evidence immunity from process necessarily followed. In some cases it might not, though the diplomatic status was proved, as for instance in the case of a person in the service of an ambassador engaging in trade.

The certificate from the Foreign Office, which had been put in in this case, was confined to a statement that the defendant was on the diplomatic list and he thought that this was not conclusive but that the information which he had now given to the Court was conclusive.

The view taken by the Secretary of State was that the defendant performed some duties on the right side of the line between the consular and diplomatic services. His Majesty's Government did not accept the view that because Germany had amalgamated these two services she was therefore entitled to claim diplomatic immunity for persons performing purely consular functions. To support a claim for immunity a person must perform diplomatic functions, but the fact that a person entrusted with diplomatic functions also performed consular duties did not deprive him of his right to immunity.

The arguments submitted on behalf of the defendant (appellant) were in substance the same as those put forward by the Attorney-General, and those submitted on behalf of the plaintiff (respondent) the same as those adopted in the judgment of Scrutton L. J.

The Court of Appeal delivered judgment on June 23, 1927: Lord Hanworth M.R. held:

(1) that the Court in deciding whether the defendant was entitled to diplomatic privilege must act upon the best evidence as to his diplomatic status;

(2) that where the Foreign Office had taken the responsibility of intervening and a statement was made to the Court by the Attorney-General on behalf of the Foreign Office and in his own person that a person had been received and was recognized by His Majesty as possessing diplomatic status, such evidence was conclusive and no other evidence of the defendant's status was admissible or needed;

(3) that if in the face of such intervention the Court should proceed to investigate the facts for itself and should come to a conclusion differing from the position adopted by the Foreign Office, that divergence between the Court and the Department responsible for such matters, which was deprecated by the House of Lords in the case of the *Duff Development Co. v. the Government of Kelantan* ([1924] A.C. 797), would become apparent;

(4) that, while the defendant was recognized as possessing diplomatic status, effect

must be given to the immunity which flowed from it, and the cross-examination of the defendant was (i) superfluous as no further evidence of his status was needed and (ii) would be a breach of the immunity to which he was entitled, and that therefore the appeal should be allowed and the order that the defendant should attend for cross-examination rescinded.

Scrutton L.J. held:

(1) that it was for the defendant to prove that the actual position occupied by the defendant and the actual work done by him brought him within the class of servants and suite of an ambassador who are immune from legal proceedings;

(2) that the statement of the Attorney-General on the instructions of the Foreign Office (even if admissible, which the L.J. doubted) was not conclusive as to the status of subordinate members of the staff of an embassy since the Foreign Office had no knowledge of the internal affairs of a foreign embassy, though such a statement was conclusive as to the status of a foreign sovereign or of an ambassador;

(3) that in the present case, owing to the transfer of consular functions to the staff of the embassy and owing to the fact that the defendant was admittedly largely engaged in consular duties which carried no immunity, it was particularly important to ascertain the exact nature of the duties performed by the defendant in order to decide whether he performed sufficient other duties to entitle him to immunity and that cross-examination was the best method of ascertaining such facts;

(4) that therefore the appeal should be dismissed and the order of Shearman J. should stand.

Sargent L.J. concurred in the judgment of Scrutton L.J.

The defendant appealed to the House of Lords where judgment was delivered on July 18, 1928.

Lord Buckmaster held:

(1) that as already laid down in *Macartney v. Garbutt* (24 Q.B.D. 368) the status of an ambassador or any member of the staff of an ambassador was a matter of comity and depended on his reception and recognition conditionally or unconditionally by the Foreign Office acting on behalf of His Majesty;

(2) that the reception and recognition of an ambassador or any member of the staff of an ambassador was a matter which was necessarily within the knowledge of the Foreign Office;

(3) that it had already been decided in the case of the *Duff Development Co. v. Government of Kelantan* that the best evidence in matters depending upon recognition by the Crown was a statement made in the appropriate manner by and on behalf of the Crown, and that such evidence was conclusive, and it was not disputed that the principle applied where the status of an ambassador was in question;

(4) that no distinction was made in the Statute 7 Anne c. 12 between an ambassador and his staff and it was difficult to see why any such distinction should be made, seeing that the privilege and the considerations mentioned above were the same in each case, and that, therefore, the statement of the Attorney-General as to the status of the defendant was conclusive in this case and the appeal should be allowed.

Lord Blanesburgh concurred in the opinion of Lord Buckmaster.

Lords Dunedin, Phillimore, and Warrington delivered opinions to the same effect.

2. *In re Visser. H.M. The Queen of Holland v. Drukker and others.* [1928] 1 Ch. 877 (Tomlin J.)

The deceased V., a Dutch subject, died domiciled in Holland leaving assets in England. The defendants were his heirs and executor under his will, who had been granted administration, with the will annexed, of his estate in England. The plaintiff, as sovereign of the Netherlands, claimed that under Dutch law the estate of V. was liable to succession duty and such duty constituted a debt from the said estate to the plaintiff, and that a declaration should be granted that the plaintiff was a creditor of the estate and for an account, and if necessary for an order that the estate should be administered by the Court. The defendants applied for an order that the plaintiff's claim should be struck out on the ground that it disclosed no cause of action which could be entertained by the English courts.

The defendant contended that the rule stated in Dicey's *Conflict of Laws*, 4th edition, p. 224, Rule 54 (1), was a correct statement of English Law, "The Court has no jurisdiction to entertain an action (1) for the enforcement, either directly or indirectly, of a penal, revenue, or political law of a foreign state," and that so far as foreign revenue laws were concerned the statement was supported by dicta in certain cases and by the decision in the case of *Municipal Council of Sydney v. Bull*.

The plaintiff contended that the last-named case was not a direct authority for this proposition, since it only decided that the claim of a foreign municipal authority for the recovery of municipal rates or taxes could not be entertained, and that dicta in other cases, in particular *Bristow v. Sequeville* showed that the English Courts will take notice of foreign revenue laws; and the remarks of Scrutton L.J. in *Ralli Bros. v. Compania Naviera Sota y Aznar* showed that the point was not decided.

Held: (1) That the statements in *Bristow v. Sequeville* and other cases only showed that, where a contract governed by a foreign law was sued on and it was consequently necessary to prove the validity of such contract by such foreign law, and where such contract was invalid by such foreign law, the English courts recognized the effect of such foreign law as invalidating the contract, although the provisions of the foreign law which invalidated it were revenue laws; though, on the other hand, if the foreign law, revenue, or otherwise, only made the contract inadmissible in evidence, the contract would not thereby be rendered inadmissible in the English courts.¹

(2) That it was impossible to draw any distinction in principle between the enforcement of foreign municipal rates and taxes and foreign state taxes or duties, and that consequently the case of the *Municipal Council of Sydney v. Bull* was a direct authority which the court of first instance must follow.

(3) That for the reasons given above the plaintiff's claim must be struck out and, the foreign sovereign having submitted to the jurisdiction in bringing the action, the Court had jurisdiction to order her to pay the costs.

3. *First Russian Insurance Co. (in liquidation) v. London and Lancashire Insurance Co., Ltd.* [1928] Ch. 922. (Romer J.)

This action was brought by the English liquidator of an insurance company incorporated under the laws of Imperial Russia against an English insurance company with which the plaintiff company had entered into certain treaties of re-insurance. These treaties fell into two groups, (1) called the Outward Treaties, concluded in 1907, (2) called the Inward Treaty, concluded in 1897. Under the Outward Treaties the plaintiff company participated in fire risks insured by the defendant company outside Russia, and under the Inward Treaty the defendant company participated in risks insured by the plaintiff company in Russia, in each case in return for a cession of a proportionate share of the premiums. Under these treaties arrangements were made for the payment of balances at certain periods.

For the purposes of business under the Outward Treaties the plaintiff company were represented by a London firm, M. & C., under a Power of Attorney, and it was held that the plaintiff company in fact carried on a branch of their business in London through M. & C. Balances were payable in sterling to and by M. & C. in London. The plaintiff company had considerable assets in England.

For the purposes of business under the Inward Treaty the defendant company were represented by agents in Petrograd to and by whom balances were payable in silver roubles, and there was a provision that disputes (if any) arising out of the operation of this treaty were to be settled according to Russian insurance usage by arbitration in Petrograd.

In November 1917 the Soviet Government (R.S.F.R.) came into power in Petrograd and passed certain decrees:

(a) *Decrees September 14 and October 3, 1918*, prohibiting the payment of money to persons abroad in settlement of any accounts without permission of the Commissariat of Finance.

(b) *Decree December 1, 1918*, declaring all insurance business a state monopoly, and providing for the liquidation of all private insurance companies by April 1, 1919, and for the transfer of their property to the state.

¹ i.e. since this is a matter of procedure governed by the *lex fori*.

(c) *Decree March 4, 1919*, relieving state enterprises of the obligation to pay to private persons or enterprises debts incurred prior to their nationalization.

(d) *Law January 1, 1923*, introducing the Civil Code of the Soviet Republic, declaring that the judicial institutions of the Republic should not entertain disputes relating to civil legal relations arising prior to November 1917.

Under the Inward Treaty no business was done after December 1, 1918, and it was admitted that by reason of the decree of that date no further business could be done and that the treaty then came to an end. A balance was then owing to the defendant company, and in 1922, D., managing director of the plaintiff company, acknowledged in letters the existence of this balance.

The defendants and M. & C., the plaintiffs' agents in London, had considerable, if not complete, information of the course of events in Russia, including the text of the Decree of December 1, 1918, but business under the Outward Treaties was continued between the defendant company and M. & C. until December 31, 1919, when they were terminated by the defendant company, after having, in May 1919, been extended by an agreement concluded through M. & C. On December 31, 1919, there were balances due to the plaintiff company under the Outward Treaties, chiefly or entirely in respect of business posterior to December 1, 1918.

The defendants refused to pay these balances, claiming (1) that the Outward Treaties had been brought to an end by the Russian legislation on December 1, 1918; (2) that they were entitled to set off the amounts due to them in Russia under the Inward Treaty. In 1926 the English Courts made an order for the liquidation of the plaintiff company, and in 1927 the liquidator commenced an action for the recovery of the balance due under the Outward Treaties.

In view of previous decisions it was not contended by either party (i) that the English Courts should decline to recognize the Soviet legislation; (ii) that the decree of December 1, 1918, put an end to the existence of the plaintiff company (*Employers Liability, &c. v. Sedgwick, Collins, & Co.*—see *Year Book*, 1927, at p. 199); (iii) that the Russian legislation attempted to or could confiscate the property situate outside Russia of the plaintiff company (*Russian Commercial, &c., Bank v. Comptoir d'Escompte de Mulhouse. The Jupiter No. 3.*—see *Year Book*, 1928, p. 176). It was not seriously disputed (1) that the Outward Treaty was a contract governed by English law creating a debt situate in England; (2) that the Inward Treaty was a contract governed by Russian law creating a debt situate in Russia.

In their defence to the plaintiffs' claim on the Outward Treaty, the defendant company contended that the Outward Treaty came to an end on December 1, 1918, on the grounds:

(1) that by reason of the Decree of December 1, 1918, the plaintiff company were disabled from carrying on any re-insurance business as from that date;

(2) that by reason of the same Decree the authority of M. & C. under their Power of Attorney was determined on that date;

(3) that the Decree and the confiscatory acts and legislation of the Soviet Government rendered the continuation of the treaty impracticable in a commercial sense; in particular in view of the confiscation of the bulk of the plaintiff company's assets which were situate in Russia, and, the treaties being concluded on the footing that the financial position of the plaintiff company should not be affected by such legislation, were put an end to by frustration on December 1, 1918, and that, the events being sufficient to put an end to them by frustration, the contract was brought to an end, and the knowledge of the parties as to such events was immaterial.

Held: (1) that, though the plaintiff company, being a Russian company, could not carry on insurance business if it had no power by Russian law to do so, the Decree of December 1, 1918 (which applied to Russian and foreign companies alike) only prohibited all companies from carrying on insurance business in Russia and did not deprive the plaintiff company of power to carry on such business outside Russia, and consequently through a branch in London;

(2) that the Decree of December 1, 1918, put the plaintiff company into liquidation in Russia, but such liquidation did not put an end to the powers of the company's agents till they were revoked by the Russian liquidators, and that this had not been done;

(3) that since the Decree of December 1, 1918, did not affect the plaintiff company's power to continue the business of the Outward Treaties and since the parties not only

continued after that date to carry on business under those treaties but attained their commercial objects, all risks payable by the plaintiff company being paid, it was impossible to maintain that the treaties had been frustrated by the Russian legislation; (4) that consequently the defence to the plaintiffs' claim on the Outward Treaties failed.

In defence to the defendants' claim to set off the balance due in roubles in Russia under the Inward Treaty, the plaintiffs contended:

(1) that, this balance being a debt situate in Russia, this debt had been extinguished by the Decree of December 1, 1918, and/or of March 4, 1919, and/or the law of January 1, 1923; alternatively (2) that, even if it had not been extinguished, payment of the debt had been rendered illegal by the Decrees of September 14 and October 3, 1918; alternatively (3) that the balance was a debt which was barred by the Statute of Limitations and could not therefore be relied upon by way of set off.

Held: (1) that the Decree of December 1, 1918, though depriving the plaintiff company of powers to carry on business in Russia and of their assets in that country, did not relieve them of their obligation to pay their debts out of assets outside Russia;

(2) that the Decree of March 4, 1919, only provided that the state enterprises should not be liable for the debts of the business they took over, but did not affect the liability of the companies from which the business was taken;

(3) that the law of January 1, 1923, only affected the remedy in Russia and not the right;

(4) that the Decrees of September 14 and October 3, 1918, were decrees passed to protect the Russian exchange and only prohibited payment in a certain way and did not apply to the payment of debts to persons abroad out of assets situate abroad, and in any case the plaintiffs had not been refused permission to pay this debt because they had not applied for it;

(5) that, though, since the plaintiffs had a branch in England and could therefore be sued there, the defendants could not maintain that the operation of the Statute was suspended because the plaintiff company were beyond the seas, nevertheless the running of the period of six years was interrupted in this case by the acknowledgment of the debt in writing contained in the letters of D., the managing director of the plaintiff company, who had authority to give such an acknowledgment, and his authority and powers had not been terminated by any of the Russian decrees;

(6) consequently the plaintiffs' defence to the defendants' claim to set off the balances due on the Inward Treaty failed.

4. *H. v. H.* [1928] P. 206 (Lord Merrivale, P.)

In this suit a wife petitioned for a dissolution of her marriage, which had been celebrated in England in 1915, on the ground of the adultery of her husband in 1927 and 1928 at Nice. A decree of judicial separation had been granted to her by the English courts in 1921.

The respondent appeared under protest and disputed the jurisdiction of the Court on the ground that since 1923 he had ceased to be domiciled in England and had become domiciled in France, and obtained an order from the registrar that the question of his domicile should be set down for trial as a preliminary question of fact. The petitioner now applied for the setting aside of the order of the registrar and for the disallowance of the respondent's appearance under protest, on the ground that, the matrimonial domicile of the parties having been England and the respondent having deserted the petitioner and gone abroad, he was estopped from asserting that he had changed his domicile, and relied upon certain dicta in the cases of *Niboyet v. Niboyet*,¹ *Armytage v. Armytage*,² and *Ogden v. Ogden*.³

¹ *Niboyet v. Niboyet*, [1878] 4 P.D. 1, 14.

"The case of an adulterous husband deserting his wife by leaving the country of his domicile and assuming to domicile himself in another might seem to cause an intolerable injustice; but one cannot help thinking that in such a case, if sued by his wife in the country in which he had left her, he could not be heard to allege that that was still not the place of his married home, i.e. for the purposes of that suit, of his domicile."

For notes 2 and 3 see page 256.

Held: (1) That there was no reported case in which effect had been given to the propositions contained in these dicta.

(2) That it could not be contended as a matter of substantive law, that desertion or the grant of a decree of judicial separation stereotyped the matrimonial domicile in the country of domicile at the time of desertion or decree, and that consequently the proposition for which the petitioner contended would, if valid, constitute in cases where in fact the husband had changed his domicile, an exception from the rules of English law recently strongly emphasized in the House of Lords and Privy Council, that jurisdiction in divorce depended on the matrimonial domicile: that there could only be one matrimonial domicile which was that of the husband, and that two countries could not simultaneously be competent in matters of divorce in respect of the same parties.

(3) That estoppel was a rule of procedure or evidence under which a person who has made a representation, on the faith of which he has induced another to alter his position, is not permitted in a suit with that other to deny the truth of that representation whether it be true or not; that the rules relating to estoppel operated in the trial of issues as to domicile in the Divorce Court in the same manner as in other proceedings in the High Court and not otherwise; that the proposition that a husband who has deserted his wife in England and gone abroad is precluded from alleging that he has acquired a new domicile abroad does not come within such rules and was not an estoppel but rather in the nature of a legal fiction similar to those by which jurisdiction was assumed by the English courts in the eighteenth century when averments of facts on which jurisdiction was founded were protected from contradiction by rules of procedure: His Majesty's Courts did not in the twentieth century proceed on such lines and the issue of domicile must be determined on the facts and not by the application of a legal fiction or presumption.

(4) That a proved desire to avoid jurisdiction such as that which was the basis of the dicta in the cases relied on by the petitioner was a fact which would have to be taken into consideration with other facts when the issue of domicile was tried, and the genuineness of the respondent's expressed intention to set up his permanent home abroad had to be weighed, and that consequently, for the reasons given above, the application to rescind the order for trial of the issue of domicile failed and that issue must be tried in the circumstances upon *viva voce* evidence.

² *Per Sir Gorell Barnes P.* [1894]. P. 178 at p. 185.

"The Court does not now pronounce a decree of dissolution where the parties are not domiciled in this country except in favour of a wife deserted by her husband, or whose husband has so conducted himself towards her that she is justified in living apart from him, and who up to the time when she was deserted or began so to be justified was domiciled with her husband in this country, in which case, without necessarily resorting to the American doctrine that in such circumstances a wife may acquire a domicile of her own in the country of the matrimonial home, it is considered that in order to meet the injustice which might be done by compelling a wife to follow her husband from country to country he cannot be allowed to assert for the purposes of the suit that he has ceased to be domiciled in this country."

³ *Per Sir Gorell Barnes P.* [1908]. P. 46, 78.

"In cases where a wife has been deserted in the country of the domicile by her husband in circumstances entitling her to sue for divorce, it has been held that she might sue in the courts of the domicile notwithstanding the fact that the husband has left the country and might possibly have done so with the intention of acquiring a domicile in another country. The decree in such a case is justified either by considering that the husband cannot be heard to say that he has changed his domicile, or, as some have thought, that the wife must *ex necessitate* be entitled to treat the country of the previous matrimonial domicile as still being the country of the domicile, and to require its courts to do justice to her, because otherwise it would be impossible for a wife so situated to obtain a decree, as the respondent might keep changing his abode from place to place, asserting that he had abandoned his original domicile and any domicile with which it was sought to fix him.

5. *Raeburn v. Raeburn*. 44 T.L.R. 384 (Lord Merrivale P.).

In this case Lady Raeburn petitioned for a decree of judicial separation from her husband, the respondent. The matrimonial domicile of the parties was in Scotland, but the respondent spent a certain time in England and had a house in England at which, at the time of the proceedings, the petitioner, but not the respondent, was living. The respondent also had a house in Scotland. On the actual date of the filing of the petition the respondent was in Scotland, but he was served in England with the petition a few weeks later: he also, at about the same time, began proceedings in Scotland for non-adherence (restitution of conjugal rights).

The respondent disputed the jurisdiction of the Court on the grounds (1) that he was not in England (even if resident there) at the time of the commencement of the proceedings, and that under Section 32 of the *Supreme Court of Judicature (Consolidation) Act* (formerly Section 22 of the *Matrimonial Causes Act, 1857*) the Court could only grant such relief under principles and rules which were to be as nearly as may be the same as those previously governing the Ecclesiastical Courts, and that under the Statute of Citations (23 Henry VIII c. 9) no person could be cited in an Ecclesiastical Court out of the jurisdiction where he should be inhabiting at the time of the filing of the petition, and that therefore the personal presence of the respondent in England at the time of the filing of the petition was essential. Certain dicta in *Armstrong v. Armstrong* [1889] P. 17, and *Graham v. Graham* [1923] P. 31, were relied upon. (2) That he was not either domiciled or resident in England.

Held: (1) That neither the case of *Armstrong v. Armstrong* nor *Graham v. Graham* dealt with the question raised here of a person resident in the jurisdiction, but not actually present at the time of the filing of the petition, and therefore these cases had no direct bearing on this issue. (2) That it was not the case that the Ecclesiastical Courts under the Statute of Citations had no jurisdiction if the respondent was not actually in the diocese at the time of the filing of the petition: on the contrary, where his residence in the jurisdiction was proved the respondent might be served with the petition outside the jurisdiction and the power to serve outside the jurisdiction in suits for judicial separation was expressly continued by Section 42 of the *Matrimonial Causes Act*. (3) That the respondent was resident in England since he maintained in England a house which was his and to which he might always go when he thought fit, although he had not at the relevant times exercised that right, and lived principally at another house in Scotland where he was also resident.

6. *Ellerman Lines Ltd. v. Reed and others*. [1928] 2 K.B. 144 (C.A.)

The plaintiffs were the owners of the S.S. *Falernian* which in November 1924 went ashore off the coast of Roumania. The defendants were the owners of a salvage vessel which one of them, L., a British subject, commanded, and this vessel, under a salvage contract, refloated the *Falernian* and brought her to Constantinople where she was docked for repairs to render her fit to be towed to England. Under the terms of the contract of salvage, security for the salvors' remuneration was to be deposited at Lloyds in London and the salvors undertook not to arrest or detain the ship unless she was removed from Constantinople before security was given.

In July 1925 the *Falernian* was ready to return to England in tow of a tug which had been sent out to fetch her, and arrangements had been made between the solicitors of the parties and with the authority of the defendant L. with regard to the deposit of the security, when L., with knowledge of this fact and in breach of this undertaking, instituted a salvage suit in the Turkish courts and arrested the vessel, which proceedings the plaintiffs did not defend to the end. L. fraudulently deceived the Turkish court by representing that the defendants had not authorized the arrangements with regard to security, and also as to the value of the vessel, and obtained judgment for £23,000, the vessel being worth about £4,000, which sum had already been paid.

In December 1926 the *Falernian* was sold by order of the Turkish court, after notice to the plaintiffs, to satisfy a debt admitted by the defendants to a brother of L.

The plaintiffs brought an action in the English courts claiming (1) a declaration that the Turkish judgment having been obtained by fraud and in breach of contract was unenforceable against the plaintiffs or their property; (2) an injunction restraining the

defendants or their servants or agents, by themselves or by assignment, from enforcing the Turkish judgment in the English courts or elsewhere; (3) damages for breach of contract.

Mackinnon J. granted the declaration claimed, but held that he had no jurisdiction to restrain the defendants from enforcing the Turkish judgment abroad, and awarded as damages the cost of sending the tug to Constantinople and the wages and expenses of the master and the crew of the vessel at Constantinople from the date of the arrest of the vessel till the date of the Turkish judgment, but refused to award damages for the loss of the vessel or her use, on the ground that, if the plaintiffs had defended the proceedings in the Turkish courts and proved the true value of the vessel, and that £4,000 had been paid, the Turkish courts would not have given the judgment they did.

The plaintiffs appealed, claiming (1) an injunction against the enforcement of the Turkish judgment in any foreign court; (2) further damages.

Held by the Court of Appeal:

(1) That the English courts had jurisdiction to grant, and should grant in this case an injunction restraining the defendants from enforcing the Turkish judgment in Turkey or elsewhere abroad, since the defendants were persons subject to the jurisdiction of the English courts and it was unconscionable and in breach of contract that they should enforce this judgment, and that such an injunction being directed against the defendants personally and on the ground of the defendants' own conduct, and not to the Turkish or any foreign court, in no way implied any assumption of jurisdiction on the part of the English courts over such foreign courts.

(2) That the plaintiffs were entitled to damages in respect of the loss of the vessel and in respect of the expenses of the master and crew for a reasonable time after the date of the Turkish judgment, since in the circumstances of the case it was reasonable that the plaintiffs should not defend the Turkish proceedings and the loss of the vessel followed directly from the defendants' fraud and breach of contract.

7. *The Janera*. [1928] P. 55 (Hill J.)

In 1927 a collision occurred in the Red Sea between a vessel belonging to the plaintiffs, called the *Masconomo*, and a vessel of the defendants, called the *Janera*.

In July and August 1927 the defendants commenced proceedings *in rem*, in the Mixed Courts in Egypt, against the plaintiffs' vessel, and obtained bail, and the plaintiffs commenced in the same courts a cross-action *in personam* against the defendants. In these proceedings a maritime expert appointed by the Mixed Courts reported on September 12 in favour of the defendants. On October 18 the plaintiffs issued a writ *in rem* in England against the defendants' vessel. On October 27 the action and cross-action in Egypt came on for trial and were adjourned. On November 2 the defendants entered an appearance under protest to the proceedings in England and moved to set aside the writ on the ground that the proceedings in England were vexatious and oppressive since the plaintiffs had elected to bring a cross-action in Egypt. Notice of this motion was served on the plaintiffs on December 7, but on December 6 the plaintiffs discontinued their cross-action in Egypt. On the hearing of this motion on December 12

Held: That the English court must decide the question on the position existing at the time when it was asked to set aside the proceedings. At that time the plaintiffs were only defendants in Egypt and there was no authority for staying an action brought in England, which the plaintiffs had the legal right to bring, on the ground that in another country the plaintiffs were defendants to proceedings in respect of the same matter. If the plaintiffs had not already discontinued their action in Egypt they would have been put to their election, but in this case they had already elected. The motion to set aside the proceedings as vexatious therefore failed.

8. *Jacobson v. Frachon*. 44 T.L.R. 103 (C.A.)

The plaintiff, who carried on business in London, entered into contracts to purchase silk goods from the defendant, a merchant of Lyons in France. Disputes arose as to these transactions, the plaintiff alleging *inter alia* that the goods delivered were not of the contract quality and were not delivered within the time provided in the contract. The defendant then commenced proceedings against the plaintiff in the Commercial

Court of Lyons, claiming cancellation of the contract and damages, and the plaintiff defended those proceedings. The Commercial Court appointed an expert, V., to examine the goods delivered which were in the plaintiff's possession in London, hear the statements of witnesses, investigate the contracts, and report to the Court. V. reported to the Court substantially in favour of the defendant. The plaintiff then applied to the French court for the appointment of another expert who should present a further report, on the grounds that V. had not acted judicially and fairly, had only made a perfunctory examination of the goods, and refused to hear witnesses. The French court, however, accepted the report of V. and gave judgment for the defendant, cancelling the contract, and ordering the plaintiff to pay £200 damages.

During the course of the proceedings in France, an action in England was commenced by the plaintiff against the defendant, claiming damages for breach of contract in respect of the same matter, but interlocutory proceedings were not concluded until after the judgment of the French court when the defendant put in an amended defence, pleading that the matter was *res judicata* and the plaintiff was estopped by reason of the French judgment from making the allegations on which his claim was founded.

The plaintiff also appealed from the French judgment and applied to the French Court of Appeal to postpone the case till after the conclusion of the proceedings in England, but he had abandoned his appeal in France before the trial of his action in England.

At the trial of the action in England the plaintiff contended that he was not estopped by the French judgment, because the proceedings in France were contrary to natural justice, and in support of this contention he relied on the same grounds as those which he had raised in the French court against the report of V., and also on the ground, not taken before the French courts, that V. was biassed and ought not to have been appointed as expert at all because he was a brother-in-law of a partner of the defendant.

At the trial before Roche J. the allegations of the plaintiff in support of the contention that the French proceedings were contrary to natural justice were investigated, and Roche J. found that the allegations were substantially proved and the report of V. was the "erroneous and uncandid production of a biassed and prejudiced mind" and V. ought not to have been appointed as expert in this case, but held that they were not sufficient to establish the contention that the proceedings in France were contrary to natural justice, and the plaintiff was precluded by the judgment in France from raising the issues again in the English courts.

Held by the Court of Appeal (affirming Roche J.):

(1) That the English courts recognize a judgment of a foreign court of competent jurisdiction as conclusive between the parties of the issues with which it deals, and that such a judgment will estop the parties from litigating the same subject-matter in the English courts, unless *inter alia* (i) the proceedings in such foreign court were contrary to natural justice, or (ii) the judgment is the result of the fraud of the Court or fraud of the person relying on the judgment, and it is immaterial that the judgment is based on a wrong appreciation of the facts or an erroneous view of the law (*Pemberton v. Hughes: Abouloff v. Oppenheimer*).

(2) That the exception with regard to proceedings contrary to natural justice only applied to cases where there had not been a proper hearing of the case and the party had not been given proper notice of the proceedings or had not had a proper opportunity of presenting his case to the Court, and only covered objections to the procedure of the foreign court and not the merits of the decision.

(3) That as, under the French procedure, the report of V. was not final or binding on the Court, and the plaintiff had the opportunity in the French court of attacking the report on the grounds on which he now relied, the unfair nature of V.'s report, and his failure to hear the plaintiff's witnesses, did not bring the proceedings within the above exception, and it was immaterial that the English court might consider that the French court had come to a wrong conclusion in adopting, in the face of the plaintiff's objections, this report, since this was a matter of the merits of the decision.

(4) That there was no evidence of fraud on the part of the French court or on the part of the defendant in deceiving the French court.

(5) That the judgment of the French court estopped the plaintiff from raising the matter again in the English courts and was a defence to the action.

9. *In re Achillopoulos*. [1928] 1 Ch. 433 (Tomlin J.)

The deceased A., a Greek national, died domiciled in Egypt where Greek law was applicable to the distribution of his estate, leaving a large fortune of which a portion consisted of assets in England.

Under his will and by Greek law and in the events which happened his three daughters were his heirs, and K. and M. executors, but by Greek law the estate vested automatically and without the necessity of any order of any court in his heirs, upon whom the duty of administering the estate devolved, the executors possessing supervisory functions only. J. and W., as attorneys for the three heirs, were, by an order of the English courts, granted administration, with the will annexed, of the estate in England, and collected the estate in England, made the necessary advertisements in England for creditors, and discharged all debts of which they had notice. They now sought the directions of the Court as to (1) the disposal of the surplus, (2) the necessity of the advertisement for foreign creditors of the estate.

Held: (1) that there was already authority that, where executors under the law of the domicile of a deceased person have procured by their attorneys a grant of administration of the English estate, the Court may, in proper circumstances, authorize the attorneys administrators to hand over the surplus to their principals, the executors by the law of the domicile; and that there was no distinction between the case where the principal was by the law of the domicile an executor and where he was not an executor but a person, like the heirs who were principals in this case, who was charged under the law of the domicile with the duties which in English law were imposed on the executor, and that therefore the surplus could be handed to the three heirs by the law of the domicile;

(2) that an English attorney, administrator for an executor by the law of the domicile (or for a person such as the heirs in this case who is charged under the law of the domicile with the duties of an executor in English law) is free, after having taken the steps necessary to ascertain and discharge all the English debts (and to discharge any foreign debts of which he has notice), to hand over the surplus to his principals without taking active steps, by advertisement or otherwise, to ascertain the position with reference to foreign debts, because his principal is the person directly responsible for the payment of foreign debts.

10. *In re Kooperman*. [1928] W.N. 101 (Astbury J.)

K., a person of Russian origin, trading in Belgium, was, in proceedings in Belgium which he opposed, declared bankrupt. His principal creditors were British and his principal assets immovable property in England.

The Belgian courts appointed L. *curateur* of his property, and declared K.'s property, movable and immovable, in Belgium and abroad, vested in X., as K.'s sole representative, and directed X. to sell and realize his immovable property in England.

As the Belgian judgment could not affect immovable property situate in England and there was no means of bringing K. before the English courts, X. applied for an order that K.'s property in England should be vested in him as *curateur*, or alternatively that a receiver should be appointed with authority to sell such property and remit the proceeds to X., and contended that the English courts could and should assist the trustee in a foreign bankruptcy to realize the assets in England.

Held: That X. should be appointed without security receiver in England of K.'s immovable property, with authority to sell the same and retain and deal with the same as trustee or *curateur* in the Belgian bankruptcy.

11. *Littauer Glove Corporation v. F. W. Millington Ltd.* 44 T.L.R. 746 (Salter J.)

The plaintiff corporation was an American company carrying on a manufacturing business in New York. The defendant company was a British company, with registered office and principal place of business in Manchester and branches in London and elsewhere, but not in the United States, which carried on the business of clothiers' merchants, and whose directors were in the habit of paying business visits to the United States where they saw samples and made purchases. On April 3, 1922, at the end of

such a visit during which he had travelled to several different states, the managing director of the defendant company was staying in New York at an hotel and making use to some extent of an office in New York of the United Mills Corporation, who were the defendants' principal suppliers in the United States, and in that office he was served with a writ issued from the Supreme Court of the State of New York by the plaintiffs against the defendant company.

No appearance was entered by the defendant company and no step in the proceedings was taken, and there was no submission to the jurisdiction of the courts of New York, and on the following day the defendants' managing director sailed for England.

The plaintiffs continued their proceedings in New York and obtained judgment by default and on this judgment action was now brought in the English courts. The defendant company contended that the judgment could not be enforceable against them by action, because in the circumstances the courts of New York had no jurisdiction. The plaintiff corporation contended that the defendant company were subject to the jurisdiction of the courts of New York, because on April 3 the defendant company was resident and present in New York in the person of their managing director.

Held: That, in order to render the defendant company, which was a British company, subject to the jurisdiction of the courts of New York, the defendant company must be found to be carrying on business at some definite, and to some extent permanent, place in New York, so that the company could be held to be resident in New York, but in the present case the facts did not justify any such finding and that consequently the judgment sued on was not the judgment of a court of competent jurisdiction and could not be enforced.

12. *R. v. Moscovitch.* 44 T.L.R. 4 (C.C.A.)

The accused had been convicted of bigamy on the ground that he had married L. M. in 1881 at Lodz, then in Russia, and in 1925, L. M. being still alive, he married S. E. in England.

He appealed on the ground that no evidence had been adduced at his trial to prove that the marriage in 1881, which was celebrated under the rites of the Jewish religion, was a valid marriage by the law then prevailing in Russia, the evidence on which the Court had relied for his conviction being that of a rabbi who only testified that the ceremony was good in Jewish religious law.

Held: That the conviction must be quashed on the ground that, in order to support a conviction of bigamy where one of the marriages was celebrated abroad, the validity of such marriage by the law of the country where it had taken place must be proved by the evidence of a professional lawyer or one who was *peritus virtute officii* with the law of that country, and no such evidence with regard to Russian law had been adduced at the trial.

REVIEWS OF BOOKS

Recueil des Cours de l'Académie de Droit International: 1927, Vol. I, pp. 615; Vol. II, pp. 592; Vol. III, pp. 673; Hachette, Paris.

These volumes contain a first instalment of the lectures delivered at the Academy in 1927, and form Volumes XVI to XVIII of the whole series. Since they contain fourteen courses of lectures, a single review can do little more than indicate their varied contents.

Four courses deal with pure theory. M. Verdross, in *Le Fondement du Droit International*, presents the doctrine which has come to be associated with the modern Austrian School in a less coldly intellectual form than has been given to it by his colleague M. Kelsen. M. Verdross is in sympathy with much of Kelsen's teaching, including the "unitary" conception of law, but he departs altogether from Kelsen's positivist standpoint, and from the latter's curious refusal to admit that his doctrine leads logically to the "primacy" of International Law. M. Le Fur, in *La Théorie du Droit Naturel depuis le XVII^e siècle et la Doctrine Moderne*, is another powerful supporter of the modern movement for a return to Natural Law in its traditional pre-eighteenth-century sense. M. Kraus breaks somewhat unfamiliar ground in a discussion of *La Morale Internationale*; and M. Trelles writes sympathetically of *Francisco de Vitoria et l'École Moderne du Droit International*.

Specific problems of international law or organization are treated by M. Efremoff in *La Conciliation Internationale*; Miss Sarah Wambaugh in *La Pratique des Plébiscites Internationaux*; M. Van Eysinga in *La Guerre Chimique et le mouvement pour sa répression*; Mr. John B. Whittton in *La Neutralité et la Société des Nations*; M. Heyligers, himself one of the judges on the Mixed Courts, in *L'Organisation des Tribunaux Mixtes d'Égypte*; Sir John Fischer Williams in *Quelques Aspects Juridiques des Transferts Contractuels de Richesse entre États*; and M. de Boeck in *L'Expulsion et les difficultés internationales qu'en soulève la pratique*. M. Bourquin in *Crimes et Délits contre la Sécurité des États Étrangers* argues for the existence of this exception from the territorial basis of criminal jurisdiction, and makes the interesting suggestion that the Anglo-Saxon opposition to this view is based not on any special devotion to territoriality as a principle—that, as he rightly says, is not our habit of thought—but on reasons of a more practical order which deserve consideration, but which he thinks are in fact already satisfied in the existing law if properly understood. Finally two articles deal with Private International Law, M. Niboyet discussing the power of the parties to a contract to choose the law which is to govern it in *La Théorie de L'Autonomie de la Volonté*, and M. Diena writing on *Les Conceptions du Droit International Privé d'après la doctrine et la pratique en Italie*.

Quite apart from the intrinsic merit of the work contained in this *Recueil*, the organization of the Academy gives it certain advantages which can hardly be secured in an equal measure by any of the other numerous series of monographs which are at present being published on international law. As the above list of authors shows, it attracts men of affairs who can contribute that element of contact with reality which has sometimes been absent from international legal literature; it secures the interest of men whose special studies have lain, not perhaps in

international law pure and simple, but in allied subjects, which is certainly good for international law and perhaps good for the writers as well; and—no small boon to those whose duty it is to attempt to keep *au courant* with the flood of international legal literature—it sometimes induces those who have written a large book to put the kernel of their thought into a small one.

J. L. B.

Répertoire des traités et des engagements internationaux concernant les Pays-Bas (1845–1900): par C. J. E. Bosmans et M. Visser, avec une préface de Jonkheer W. J. M. van Eysinga. La Haye, Martinus Nijhoff, 1928: xvi+204 pp., fl. 15.

This publication exactly fills a gap in the existing works on the treaty engagements of the Netherlands, which are:

Adriaan Kluit, *Index chronologicus, sistens: Federa . . . ab ordinibus Reipublicae Belgicae federatae inita . . .* [covering the years 1276–1788]. Leyden, 1789.

H. A. van Dijk, *Répertoire . . . des traités conclus par la Hollande depuis 1789 jusqu'à nos jours*. Utrecht, 1846.

Bosmans et Visser, *Répertoire des traités . . . du XX^e siècle concernant les Pays-Bas*. The Hague, 1921.

The new volume thus completes the list, and we have now full material from the earliest times to 1920.

The bulk of the book is occupied by a chronological list of treaties: the method of citation may be seen from the following specimen entry, dealing with Holland's only treaty with Mexico, of September 22, 1897:

655. PAYS-BAS ET MEXIQUE.—Traité de commerce et d'amitié, signé à Mexico.

Ratifications échangées à Mexico le 12 juillet 1899.

Dénoncé par le Mexique le 15 octobre 1925 et *abrogé* le 15 octobre 1926; renouvelé jusqu'au 15 avril 1927 par échange de notes des 12/31 août et 14/28 septembre 1926; jusqu'au 31 décembre 1927 . . . jusqu'au 30 juin 1928 . . . jusqu'au 30 novembre 1928 par échange de notes des 16 et 26 mai et 4 juin 1928.

Recueils: Staatsblad 1899, No. 200.—Luttenberg 1899, p. 83.—Staatsblad Ned. Indië 1900, No. 63.—Lagemans XIV, No. 872, p. 3.—Tratados Mexicana 1909, II, p. 85.—de Martens N.R.G. 2^e série, XXXIII, p. 185.—State Papers, LXXXIX, p. 610.

The chronological table is followed by an alphabetical index of the countries which have contracted treaties with Holland, with references, and by an analytical index of the subjects of the treaties.

The difficult subject of international or multilateral treaties is conveniently handled by means of tables showing ratifications and accessions by other Powers.

The work of Messrs. Bosmans and Visser should serve as a model to other countries. The documentation of the treaty position of the Netherlands to 1920 is now complete, and it is to be hoped that the Legatum Visserianum of Leyden, which has financed the present publication, will ensure its continuation from time to time.

S. GASELEE.

The Law of Nations. By Professor J. L. Brierly. Oxford: Clarendon Press. vi + 288 pp. (5s. net.)

Professor Brierly's little book is described as being "intended both for the general reader who is interested in international relations without being a

specialist in international law, and for the student who needs an introduction to the standard works on the subject". It admirably fulfils both purposes. Within the compass of nine chapters the author has contrived to give a clear and sufficiently comprehensive account of the main heads of the international law of peace, which will be invaluable to the general reader who is interested in the subject, and will provide the student with an admirable framework into which he can fit more detailed studies.

The book is, however, much more than a mere elementary text-book. The refreshingly common-sense spirit in which Professor Brierly invariably approaches questions of international law is very apparent in the Preface, and runs through the whole of the book, which thus provides a useful corrective to works of a more theoretical character. From this point of view the first two chapters are highly to be commended, while if every person who desires to express his views on such subjects as "All-in" arbitration treaties or the Compulsory Clause of the Statute of the Permanent Court could be compelled before doing so to read Professor Brierly's chapter on "Disputes between States", we should be saved a great deal of confused thought and speech.

W.

The Development of International Law. By Sir Geoffrey Butler, K.B.E., M.A., and Simon Maccoby, M.A. London: Longmans, Green & Co., Ltd. 1928. xxxv+566 pp. (25s.)

The appearance of this work only preceded by a short interval the death at an early age of its principal author, of whom a notice appears in another place in this volume. Sir Geoffrey Butler, as he states in his preface, was responsible for the actual writing of the book in its final form, which shows in many places that it is the product of a mind of remarkable fairness and with a great ability for seeing in their true historical perspective even recent and controversial events, qualities which, had the fates ruled otherwise, might have justified the expectation that he would in the future—either in the academic sphere or in public life, for he was active in both—have exercised an influence in international developments which would certainly have been salutary and probably far-reaching.

This volume contains a very large amount of material, the collection and handling of which is at once evidence of and a credit to the industry and ability of its two authors. It is not really any disparagement of the book to say—and it is the fact—that the title leads one to expect something different. First of all, in its general character the work is that of a historian rather than that of a lawyer, and of a political historian rather than a legal historian. Comparatively very little space is devoted to the discussion of the development of legal principles as such, though in the chapters on the *Dominium Maris* (Chapter II) and on the Laws of Warfare at Sea (Chapter IX) there are passages where this is done very well, and there is nowhere drawn that distinction which international lawyers must draw—though there is room for discussion as to the extent of its reality—between political practice and rules which have become law.

It is perhaps more difficult to suggest in three or four words a description which would express the essential character of the work. Perhaps the history of international society and its institutions would come somewhere near the mark. It is a history of the conditions—political and intellectual—in which international law developed, which settled the lines on which it developed, and which, as one might say, formed the background of the development of international

law. As such, it may be most useful to the lawyer as well as to the historian. To the lawyer investigating the real meaning or origin of certain principles which he is accustomed to regard as settled law, a recourse to this work will be generally a stimulating and sometimes a disconcerting experience, so fortuitous is the origin of such principles often shown to be and so recent and perhaps too rapid their crystallization under the hands of the legal writers of the nineteenth century.

On the other hand, owing to the variety and amount of the information collected in this work, one may be tempted to describe it as a "companion to studies in international law".

Its arrangement is an original one; at first sight perhaps a little puzzling. It is divided into eighteen chapters of considerable length, each of which is devoted to a fairly wide topic, such as "Intercourse in peace", "Neutrality", "The European Concert in Political Action", and the matter which is grouped under these headings is treated in each chapter more or less from the earliest times to the present day. These chapters are grouped in three parts, called respectively "The Age of the Prince", "The Age of the Judge", and "The Age of the Concert". Actually, however, this division is not, in spite of the word "Age" one so much of time as of character. Each chapter in fact continues the treatment of its subject down to the present day, but the institutions dealt with in the different parts may be said to be characteristic of the general tendency in international development typified in these headings.

The book is furnished with an index, and a synopsis which should enhance its convenience as a work of reference. The foot-notes, however, are collected at the end of each chapter, a practice which is most inconvenient and which it is hoped will be dropped in future editions. E.

Canada and World Politics. A Study of the Constitutional and International Relations of the British Empire. By Percy Ellwood Corbett, M.C., M.A., and Herbert Arthur Smith, M.A. Faber & Gwyer, Ltd., pp. xvi+244. (10s. 6d.)

The full title of this excellent little book indicates both its special and general character. It is primarily a study of the present constitutional and international position of Canada, and it opens with an historical summary of the steps by which that position has been reached; but as the status of Canada in these respects does not substantially differ from that of the other self-governing dominions the body of the book is really an analysis of the present constitutional position of the autonomous communities which compose the "British Commonwealth of Nations", of their relations *inter se* and with foreign Powers, and of the nature of the ties, whether of a legal character or not, which hold them together. As such the book can heartily be commended; the implications of the "Balfour Report", though they are being worked out in practice almost daily, are not yet altogether clear, and this book will be of real assistance to any one who is seriously desirous of thinking out the true position.

The authors are obviously right in pointing out (Chapter V) that there are several entities in the international world of to-day which it is impossible to force into any of the categories which are to be found in the text-books. "Regarded as an intellectual exercise the task of determining the position of the sovereignty over the mandated territories, of finding a resting-place in the old categories for the Free City of Danzig or the Saar Basin, is not without interest. But certainly

its practical value is negligible." This observation is to a large extent true as regards the international position of the self-governing Dominions. To endeavour to find a place for them in the old categories is to approach the problem from the wrong end; the only useful method is to ascertain what their actual position is, and then international law must find a place for them; if it could not do so it would cease to be international law. It is on these lines that the book proceeds, but one may perhaps wonder whether the authors are not exposing themselves to their own criticism when they discuss and reject, for very cogent reasons, the possibility of turning the British Empire into a "personal union". It is true that the writers of text-books have given the name of "personal union" to certain historical cases where a single person has been simultaneously the sovereign of two countries, and that consequently certain theorists have discussed the question whether it is possible to thrust the British Empire into a pigeon-hole labelled "personal union", or whether it would be possible and desirable to modify its present character so as to fit it for a resting-place in that receptacle. It does not require much study of the subject to show that the British Empire, as at present constituted, differs fundamentally from the personal unions known to history; but it is equally true that if the British Empire were turned into something which could be labelled "personal union" the practical differences between it and those unions would nevertheless be so substantial as to render identity of nomenclature inappropriate. Generally speaking the authors consider that the existing constitutional and international position is, for practical purposes, and allowing for the recommendations to be made by the Expert Conference, which is to meet shortly in consequence of the resolution adopted in 1926, satisfactory; what is needed in their view is not so much any change of status or policy as improved machinery for consultation and co-operation.

On some points it is possible to differ from the authors' arguments. On p. 35 they state that "the Irish Free State would appear to be exempt from the operation of the Colonial Laws Validity Act, since she is expressly empowered to adopt or reject Imperial legislation at her own discretion", without discussing how such a position is reconcilable with the fundamental principle that the constitutional position of the Free State is identical with that of Canada. On two occasions the authors argue that the fact of full powers to Dominion Plenipotentiaries being issued, and the ratification of Dominion treaties effected, on the authority of documents which bear the counter-signature of a United Kingdom Minister involves a power of control by United Kingdom Ministers over the Dominions' power of treaty making. Surely this contention is inconsistent with the whole trend of the 1926 Report, which emphasized the equality in this respect of the different members of the Commonwealth, and provided against action which might be inconsistent with the interests of other members by the method, not of reserving a power of control to any one Government, but of ensuring communication and consultation before treaty obligations are accepted by any one Government. In any case the authors' description of the Great Seal as "the Great Seal of Great Britain" seems to be inaccurate and inconsistent with the wording of the Royal and Parliamentary Titles Act, 1927. On page 55 language is used which suggests, perhaps inadvertently, that international arrangements which take the form of governmental agreements are not binding on the successors of the Governments which made them.

The authors may be congratulated on a piece of work which will be of real

assistance to all who desire to study the structure and possible development of the constitution of the British Empire.

Political Handbook of the World, Parliament, Parties and Press: edited by Maleshin W. Davis and Walter H. Mallory. 1929. Yale University Press for the Council of Foreign Relations. pp. 198. (\$2.50 post paid.)

This is a very useful book, and contains a survey of the parliaments, parties, and press of the various states of the world. The object of the work is stated in the Foreword as follows: "When a new Ministry takes power in France or Japan, when a public leader makes an important statement, when comment on some current international question is quoted in the press from newspapers abroad, a reader often is unable to judge the real significance. To meet this need for special information, the work of preparing this handbook has been undertaken." Under the heading of each country is given the Monarch or President, the Cabinet, the composition of the legislature, and an account of the programmes of the various parties and leaders. As to the accuracy of these there will naturally be room for differences of opinion. Under this heading the Labour Party in Great Britain is credited with the policy of advocating renunciation by international treaty of war as an instrument of national policy, but nothing is said of this policy under the heading of the Conservative Party. This conveys an erroneous impression having regard to the fact that the Kellogg-Briand Peace Pact was signed by a Conservative Foreign Secretary.

A. P. H.

The Hungarian-Rumanian Land Dispute. By Francis Deák, with an introduction by Geo. W. Wickersham. New York: Columbia University Press. 1928. xiv+272 pp.

This volume contains an account of the proceedings in the dispute between Rumania and Hungary over the application of the Rumanian agrarian reform scheme to landed property belonging to Hungarian optants in Transylvania. The dispute is one that has troubled the Council of the League of Nations since 1922, and no solution has yet been found. The writer is a Hungarian lawyer, and his book represents exclusively the Hungarian point of view. To judge by the contents of the book the author appears to be a supporter of the view that it is a rule of international law that there must be no expropriation of the landed property of an alien without the payment of compensation amounting to the full value of the property. The appendix contains various documents of which it is useful to have the text.

C.

The Responsibility of States in International Law. By Clyde Eagleton. New York University Press, 1928. pp. xxiv+291.

The scope of Mr. Eagleton's book is rather more limited than the title suggests, since he does not deal with the general question of the delictual responsibility of states, but only with the special problem of liability for injuries done to foreigners within the national jurisdiction. Furthermore, his examples are nearly all drawn from the diplomatic history of the United States. Within the limits which he has set for himself he has given us a carefully reasoned analysis of this difficult problem, which has recently acquired a new interest from its examination by the League Committee of Experts. The experience of his own country certainly

provides him with ample material, and he does not hesitate to point out that in the varying rôles of plaintiff and defendant her doctrine has not always been consistent.

From the practical point of view the crux of the whole problem lies in the rule, if it be a rule, that the injured individual must exhaust the remedies of local justice before seeking the aid of his Government. In its extreme form this becomes the "Calvo Doctrine", which asserts the finality of the decisions of national courts. This appears to be almost an article of faith in Latin America, and unfortunately it finds expression, though in a slightly modified form, in M. Guerrero's report to the League Committee. Its theoretical basis is to be found in a combination of the doctrine of absolute sovereignty with the doctrine of the equality of states. Neither theory is really consistent with the facts of modern international life, and insistence upon them invariably leads to practical difficulties. Its political support comes chiefly from those states whose internal organization is most defective, and most European readers will agree with Mr. Eagleton in his criticism of the South American point of view.

Mr. Eagleton grapples bravely with the theoretical side of his problem, but he is too good a realist to allow his doctrine to outrun practice, and practice is not yet sufficiently consistent to admit of a perfectly logical formulation. The broad tendency of modern international law is to shift the emphasis from the rights of states to their duties. Perhaps, as the author suggests, this may develop into a doctrine which will make the responsibility for wrong-doing a liability, not only to the injured state, but to the whole community of nations.

The book is well documented, though unfortunately a poor fount of type makes the numerous foot-notes rather trying to the eye. The printer appears to have made complete nonsense of a passage on p. 160, and Professor Corbett is in three places referred to as "Cobbett". The appendices include the "General Instructions to Claimants" issued by the State Department, which are particularly interesting as giving in summarized form the official American view as to the conditions necessary to a valid claim.

H. A. S.

Société des Nations et Problème de la Paix. By Dr. Miroslas Gonsiorowski. 2 volumes, pp. 508 and 547. Paris: Rousseau & Cie. 1927. (80 fr.)

Dr. Gonsiorowski has written an important book, important both in conception and in execution. He has taken a subject which at the present time urgently requires systematic and scientific treatment, and he has brought to its consideration both learning and the power of careful and consistent thought. The result entitles him to the gratitude of every one who is interested in the scientific study of international affairs.

To the English reader Dr. Gonsiorowski's title is unfortunately misleading. It conjures up the expectation of another vague and general political discussion of the kind with which we are already too familiar. But, in point of fact, this work is nothing of the kind. It is an intelligent attempt to make a comprehensive study of the present-day problem of the political organization of the international society of states; to examine the legal nature and constitutional working of the international political institutions that have been established; and to write an adequate and defensible account of the changes in the nature of international law which these institutions have brought about. True, the author lays great stress on his view that the first of national interests to every people is peace; true, his

first chapter is devoted to a discussion of the "valeur intrinsèque de la guerre" while his last is an appeal to men of all lands to search out and to show to the peoples of the world the paths that lead to peace. But essentially his work is not political at all; it is rather the first considerable book that has yet been devoted to what has been sometimes called "constitutional international law".

The scope of the work is well conceived. Its Introduction begins with an interesting discussion of the nature of the "communauté internationale", and of the rules by which this community is controlled. The first part of the "First Book" is devoted to International Organization, beginning with a short sketch of the idea of international organization in the past, and going on with a detailed discussion of the institutions of the League of Nations, of the Assembly, Council, Secretariat, of their mutual relations, and of what he calls the "construction juridique" of the League. The second part of the "First Book" is devoted to "Organisation Judiciaire Internationale", much space being naturally given to the Permanent Court of International Justice. The "Second Book" deals with "Garanties Préliminaires de la Paix", i.e. with Minority Protection, the Mandate system, social problems (including the International Labour Organization), economic problems, disarmament, publicity of treaties, territorial guarantees, revision of treaties. The "Third Book" deals with the Pacific Settlement of International Disputes, and contains a fair and adequate account of the Dispute clauses of the Covenant, of the Treaty of Mutual Assistance, the Geneva Protocol, and the Locarno agreements.

In every part the discussion is founded on a detailed examination of the relevant texts, particularly of course the text of the Covenant, and of the published records of the various organs of the League of Nations. All its parts are skilfully welded together into a single and coherent whole.

Throughout both volumes the author founds his work on a "progressive" view of international law. He frankly expounds "certaines notions fondamentales du droit international qui sont considérées comme nécessitant une réforme radicale", declaring himself an adherent of the new tendency which is "intermédiaire entre l'ancienne école et l'école positiviste". His views on sovereignty may be cited as an example. "En réalité", he says, "aucun état ne peut se tenir en dehors de la communauté internationale." Therefore, "Nous considérons la souveraineté comme une notion essentiellement relative dont le contenu change à mesure que l'idée de la communauté internationale se développe. . . . Il est certain que le contenu de la souveraineté n'est plus à l'heure actuelle tel qu'il était dans le passé." As a practical instance he cites "le droit de recourir à la guerre", which used to be complete, but which "à l'heure actuelle est restreint et est destiné à disparaître". And his conclusion is: "De même que l'état peut limiter la liberté des individus, la communauté internationale peut limiter la souveraineté des états." On this fundamental doctrine, ingeniously elaborated, his work is based.

There is in all the discussion of the principles of international law and in all the applications of these principles to the practical problems of international organization, a great deal that is courageous, original, and clear-sighted. But unfortunately in the practical or "applied" parts of the book there is one criticism that continually forces itself upon the mind of the reader. The work is "academic", in the sense that too often it is not founded on the real facts of international life. Dr. Gonsiorowski has studied with care the records of the Assembly

and Council of the League; it is difficult to believe that he has ever watched these institutions actually at work. This seeming lack of touch with actual events leads him, as the present writer thinks, into a number of serious errors. Thus, to take a few among numerous examples, he says, speaking of the Assembly: "Le principe de l'unanimité entrave son développement et menace son existence;" the Secretariat, he says, "devient en fait, dans une certaine mesure, un organe de décision"; he says that "l'évolution de la Société aboutira fatalement à la suppression des privilèges des grandes Puissances au Conseil", and again that "l'évolution montre une tendance vers l'élargissement de ses (i.e. the Council's) attributions".

On all these points he seems to be far from an appreciation of the political facts of the present time. And, always in the same order of ideas, he is an almost violent partisan of the extreme doctrine of the legal equality of all states, and succeeds (very strangely) in convincing himself that the principle of equality has led at Geneva to an ever-increasing measure of equality of representation for all states, great and small, in the various organs of the League; he says of the constitution of the Council that reform by the abolition of permanent seats is urgently required; in a discussion of intervention he says: "Au moment où l'organisation internationale se substitue à l'état de l'ancienne anarchie, il est impossible de reconnaître aux états particuliers le droit d'intervention."

It must be added in justice that Dr. Gonsiorowski's purpose is frankly to seek and expound, not only existing facts, but also the future developments which he believes will be required. "Il s'agit", he writes in his introduction, "d'une part, de s'attacher aux règles en vigueur, aux cas concrets pour les approfondir et, d'autre part, de ne pas reculer, tout en respectant les besoins réels, devant la nécessité de construire une conception hardie, de déduire des principes généraux qui doivent s'imposer." He has set himself this double task of studying the "rules in force" and of discussing the general principles which ought to be applied, because he holds that "il est certain que l'existence et le développement des institutions humaines (including above all others, so he says, the new institutions of the international community) dépendent des facteurs idéologiques qui sont à leur base".

To some readers Dr. Gonsiorowski will seem to have diminished the value of his work by sacrificing the first part of his task to his too ambitious conception of the second; but they will all agree that he has made a real contribution to that development of ideas about international relations, international organization, and international law which he believes to be so important.

P. J. NOEL BAKER.

Transactions of the Grotius Society, Vol. XIII. Papers read before the Society in 1927. Sweet & Maxwell, 1928. pp. xxxiii+186. (7s. 6d.)

Eight papers read before the Society in the course of 1927 are included in the volume. Some of the papers are very interesting. Two of them touch on the problem of minorities, one of the most baffling subjects with which the League of Nations is confronted. One of these (by Baron Heyking) approaches the question purely from the point of view of the minorities and shows dissatisfaction with the handling of the whole question by the Council of the League. The other (by Dr. Goitein) is a disquisition on sovereignty, a conception which he regards as obsolescent, but which he finds to constitute an obstacle to the proper enforce-

ment by the League of the obligations imposed upon it by the Minorities Treaties because the members of the Council, which is primarily a political body, and the Secretariat of the League at Geneva who advise the Council, feel cramped by the necessity of respecting the sovereignty of the states concerned.

Dr. Masterson contributes a valuable paper on "National Jurisdiction over foreign smuggling vessels in the marginal seas", and Mr. Wyndham Bewes a refreshing and outspoken article on the Monroe Doctrine and Entangling Alliances. So often papers published on this subject are written from a purely American point of view.

Dr. Lauterpacht writes on revolution propaganda by foreign Governments, and maintains that, on the rare occasions other than in time of war when foreign governments resort to such proceedings, the inevitable result is to obliterate the border line between peace and war and to create conditions incompatible with the maintenance of orderly intercourse between nations. If Dr. Lauterpacht is right, the Trade Agreement of 1921 between Great Britain and Russia contained a superfluous provision when it prohibited each of the parties from hostile propaganda against the other.

A side of the life of Grotius with which most international lawyers are but ill acquainted is dealt with by Mr. Bodkin in a paper on the "Minor Poetry of H. Grotius". It shows a deep acquaintance with the mass of poetry which Grotius wrote, and must have taken the members of the Society who attended the meeting when it was read somewhat aback, for it seems to have led to no discussion.

Other papers are contributed by Dr. McNair on Codification and by Mr. Llewellyn Jones on Plebiscites.

C.

Studies in International Law and Relations. By Professor Pearce Higgins. Cambridge University Press, 1928. pp. viii+314. (15s. net.)

This volume comprises a series of essays, lectures, and articles delivered by Professor Pearce Higgins in the course of recent years. Most of them have already been published, though the text has been revised for the purpose of the present issue. Altogether there are thirteen papers, five of which consist of articles which the Professor contributed to the pages of this *Year Book*. As these are already known to its readers it is unnecessary to say anything more about them.

The essays at the beginning of the volume are well worthy of the study of all students of international affairs. The first is a thoughtful statement of the personal responsibility of each member of a democratic community in connexion with the conduct of foreign affairs, and the consequent need of education of the mass of the people in all that pertains to international relations, and of watchfulness on the part of those who strive to understand. These are truths which no man will now dispute, but sometimes one is left to wonder whether states do not find that the conduct of foreign affairs is made more difficult by the coming of democracy. Constitutional experiments, such as the "referendum", when applied to the approval of treaties do not render the conclusion of international agreements more easy; the tendency seems usually to be in favour of the maintenance of the *status quo*. Similarly the submission of treaties to parliamentary approval before ratification is a two-edged sword; it may diminish the chances of the subsequent repudiation of a treaty, but it certainly does not facilitate its conclusion.

The second and third papers consist of two lectures which were delivered in the United States, and it may be hoped that they were appreciated by their

audiences. One of them touches on the potential risks to international relations involved in disputes about matters which are not regulated by the rules of international law. The other is an admirable statement of the need for international law to lay stress on the principle that fulfilment of its duties by a state should be the condition precedent to claiming its rights as a state.

Another paper deals with the position of the Papacy and its relation to international law. Even though the paper was written twenty years ago the subject is of particular interest to-day because of the recent agreements between the Italian Government and the Vatican.

One of the most suggestive papers deals with Grotius and the cause of the immense influence which his work has had in helping the science of international law to achieve its present position. If we mistake not, the true explanation is to be found in the fact that Grotius always made his appeal to high principle, to man's innate sense of what is just, as the essential element in prescribing the rule to be followed. So far as the appeals of Grotius succeeded they did so because he based them on standards of morality of general acceptance, his appeal to the Law of Nature was an appeal to the educated reason of mankind in his time. The international lawyers of to-day will succeed or will fail according as they base themselves on the same principle. C.

The Supreme Court of the United States. By Hon. Charles Evans Hughes. Columbia University Press, New York, 1928. Humphrey Milford, Oxford University Press, London. 269 pp. (12s. 6d. net.)

This volume contains the text of six lectures delivered by Mr. Hughes at Columbia University for the George Blumenthal Foundation. The subject is the Supreme Court of the United States, its foundation, methods, and achievements.

To English readers the interest of this volume consists in the guidance which it may give on problems which have to be faced in connexion with the Court which the League of Nations has instituted as the central judicial organ for the states which belong to the League. The lectures tell the story of the foundation and early history of the Supreme Court, they describe the court at work, its methods, and its organization. They recount its achievements and the work it has done in cementing the Union. They show the part it has played in preserving the balance between the rights of the states of which the Union is composed and the rights of the individual citizens who together form the nation. Lastly, they describe with some detail the efforts of the Court to harmonize the interests of the individual and the interests of the community in connexion with the freedom of contract and the protection of the rights of property which are guaranteed in the fifth and fourteenth amendments to the Constitution.

It is interesting to note that when the members of the Federal Convention were fashioning the Constitution in 1787 there was practical unanimity as to the need of establishing a central judicial organ, one supreme tribunal which was to exercise jurisdiction in certain matters throughout the Union. Hamilton had realized that the want of a judiciary power was the crowning defect of the Confederation which preceded the Federal Union. It is still more interesting to see that it was the need of a national tribunal for dealing with cases of prize that had shown that in judicial matters the sovereignty of the individual states could not be supreme, and had familiarized the public mind with the idea of a superior judicature exercised by federal courts.

The gain to the Union resulting from the jurisdiction delegated to the central supreme court represented of necessity a corresponding diminution of the sovereignty of the states. Were they as reluctant to submit to that diminution as the states of the world seem to be to-day to agree to delegate powers of jurisdiction to a central international tribunal? It is the analogy between the situation of the American states in the early days of the Union and the states of the world to-day which renders the history of the Supreme Court of the United States a useful subject of study to all who aspire to a better organization of the civilized world.

It is clear that the Supreme Court has played its part in cementing the union of the United States. It is equally clear that a central judicial organ must play its part in developing and strengthening the international organization of the modern world. How far does the present organization of the Permanent Court of International Justice qualify it to play that part with general satisfaction? In September last the ninth Assembly of the League of Nations adopted a resolution in favour of considering what amendments, if any, were desirable in the Statute of the Court. Mr. Hughes's lectures show that many of the points which must be taken into consideration in connexion with the court established by the League have already arisen in the history of the Supreme Court. It is particularly interesting to see the strong stand which the justices of the Supreme Court made against attempts on the part of the Executive Government to obtain advisory opinions on points without there being brought a case or controversy before the court requiring judicial decision.

These lectures are well worth perusal, particularly by readers who are interested in the development of International Law and of international institutions. C.

International Law: A Treatise by L. Oppenheim, M.A., LL.D. Vol. I, Peace. Fourth Edition by Arnold D. McNair, C.B.E., LL.D. (Longmans Green & Co., 1928. pp. 1 + 827. (42s. n.)

The third edition of this work, partly revised by the author and completed by Mr. R. F. Roxburgh, appeared in 1920, and was reviewed in the *British Year Book of International Law*, 1921-2, at p. 232. The present edition has been especially developed and extended in so far as regards the League of Nations, and the many varied topics which the League concerns or affects—but, as it is hardly necessary to say, Dr. McNair has thoroughly overhauled all paragraphs of the book so that it clearly and concisely states the facts and views of the date of publication. Moreover, the bibliographical notices at the head of each chapter, to students and to practitioners of international law one of the most useful features of the work, have been extended and brought up to date, a laborious task in the skilful accomplishment of which the Editor has had the assistance of Dr. H. Lauterpacht.

Now that the application and detail of International Law are developing with rapidly increasing pace, and business and economic interests are world wide, public International Law has become a subject of interest and a matter of close concern to an ever-growing number of men of practical affairs, and as a book of daily reference on all or any of the questions which may so arise there is in English no work known to the reviewer to compare with Oppenheim for clear statement, effective guidance, and practical help. The immediately pressing question of state-owned shipping, for instance, is dealt with in paragraph 451a, and the foot-note refers to the Brussels Convention of April 10, 1926, which will

probably be modified before ratification; whilst the position of self-governing dominions is presented as clearly as may be at the present day in paragraphs 94a and b, and paragraphs 94c-f elucidate the status of mandated territories. Further enumeration would be tedious; on all the important issues and actual applications of public International Law the latest authorities appear to be quoted and their effect duly appreciated for the benefit equally of student, lawyer, or business man.

The references to cases decided by international courts and other tribunals have been largely increased, and there are many quotations of English decisions; these make the book more useful to the practitioner. Whilst in a work on international law—and one the authority of which is not merely national—it is no doubt not desirable to include an undue number of municipal decisions, the Editor may perhaps consider that in the next edition in connexion with the discussion of jurisdiction on the open sea a reference should be given to the interesting case of the *Tubantia* (1924, p. 78), where the President had to deal with a dispute between rival salvors of a “mystery” war wreck lying in the North Sea some fifty miles from our coast. The case of *M. Pelterie* before the Civil Tribunal of the Seine claiming a patent royalty on the airplanes used by the British Forces in France (*B.Y.I.L.*, 1926, p. 227), is also, it is suggested, worthy of reference in discussing the question of the position of armed forces in a friendly foreign state.

The volume has been on hand for a considerable time and has proved its great worth in use. Only on one point has reference to the work not been of help, namely, on the question, now of considerable importance, of the right of a state to intervene on behalf of the interests of its nationals as shareholders of a foreign company; this was much debated in the arbitration between the Reparation Commission and the United States of America in connexion with the fleet under the German flag of the *Deutsche Amerikanische Petroleum Gesellschaft*, a German Company whose stock was American owned.

In a work for daily use the index could with advantage be extended, e.g. information on “Territorial Waters” is to be easily obtained only if it is known that “State Territory” should be looked up.

But that criticism must be confined to such minor points is in itself sufficient evidence of the great merit of the new edition and of the outstanding ability with which the difficult task of revision has been effected.

A. W. B.

Jurisdiction in the Marginal Seas with Special Reference to Smuggling, by William E. Masterson, M.A., LL.D. Macmillan Company, New York, 1929. (21s.)

Dr. Masterson's book does not, as its title might perhaps at first sight lead one to expect, deal with the exercise of jurisdiction in territorial waters, but with the exercise of jurisdiction by a state on the high seas, outside territorial waters, but within certain limits from its coast, for the purpose of protecting itself from violations of its laws. This book deals in fact exclusively with the question of such special jurisdiction in connexion with customs laws, including in that term laws prohibiting entirely the import of certain classes of goods, such as alcoholic liquors.

Dr. Masterson's view is that a state possesses, quite independently of its rights of sovereignty over the belt of territorial waters in which it may have all the rights of jurisdiction attaching to a piece of territory, a special jurisdiction exercisable in a wider belt of marginal seas over shipping, for the purposes of

protecting itself from violation of its customs laws, the rights which it can exercise in the narrower belt of territorial waters being insufficient for this purpose. This jurisdiction he describes as *jurisdiction over commerce with its territory*, though it involves the exercise of some interference with some vessels which *may* in fact turn out *not* to be engaged in any commerce with that country. He contends that "the laws passed by states to regulate or protect" fisheries, neutrality, crime, pilotage, quarantine, salvage, revenue and customs, involve different considerations and they have, therefore, developed along different lines; laws securing or regulating a particular interest have been evolved from factors peculiar to such interest. They thus necessarily present distinct questions and should, therefore, be dealt with separately in a study of the law pertaining to jurisdiction in littoral seas. The attempt within recent years on the part of some writers, judges, and Governments to fix a single zone beyond which the application or enforcement of all of them is forbidden, thus treating them as a single problem, has cast this extremely difficult subject into hopeless confusion and has littered the juristic literature on the subject with careless assertion. "It would seem", he continues, "that one way out of the confusion into which the question of the so-called 'three-mile limit' or 'territorial waters' has been cast and in which it has been abandoned, is to trace historically and to study analytically the laws and practice of the maritime nations with reference to each interest, as a distinct and separate study and inquiry."

This book is such a study with regard to customs laws. It contains a full historical treatment, in some 150 pages, of the English "Hovering Acts" and Customs Acts from 1700 to 1927. In preparing this part of the book the author has had access to the library of His Majesty's Customs in London, where he has seen, and in part reproduced, a considerable amount of hitherto unpublished material in the form of orders and correspondence between the Commissioners of Customs and their officers in the ports, interdepartmental correspondence, and unreported decisions of the Courts.

The next part of the book is a similar treatment of the laws and practice of the United States in another eighty pages, where the recent decisions of the United States Courts on the seizure of rum-running vessels are considered. This part is followed by a section of 120 pages devoted to the consideration of diplomatic correspondence, treaties, and international arbitrations—in particular the diplomatic correspondence of 1910–12 relating to the Russian Fishery and Customs Laws, which assumed jurisdiction for four leagues; diplomatic correspondence from 1922 to 1927 between the United States and other countries relating to the seizure of vessels engaged in importing liquor to the United States; and the Liquor Treaties concluded between 1924 and 1928 by the United States with foreign countries, under which the latter agreed to consent to the seizure within certain limits of their vessels found to be engaged in attempting to evade the laws of the United States by introducing liquor into that country.

It is obvious that the present year is the most opportune one for the appearance of this book, when the question of territorial waters and jurisdiction in the marginal seas is shortly to be considered by an international conference summoned by the League of Nations, and the United States and Canada have agreed to submit to arbitration the case of the seizure of the *I'm Alone*, the decision of which *may* (though not necessarily) involve a decision on the existence of this special jurisdiction.

In collecting and digesting all this material on the question Dr. Masterson has done, and done well, a most useful piece of research work. The English and American Customs Statutes are of the most complicated and, to the casual reader, most repellent character. The now considerable mass of American decisions is, even when compared with most Law Reports, stiff reading, and Dr. Masterson does a great deal in clarifying these matters. The least satisfactory part of the work is, perhaps, the analysis of the American cases, where much more could be done to distinguish between the cases where the Courts purport to decide questions of International Law *as such* and those where they merely interpret an American statute.

While Dr. Masterson is scrupulously objective in his treatment of the subject, he not unnaturally brings out the parallel between the situation in England in the eighteenth and early nineteenth centuries, when smuggling was rife and England passed, and enforced against foreign vessels, its successive Hovering Acts claiming jurisdiction in respect of acts committed in limits which grew from six nautical miles in 1736 to twelve nautical miles in 1765 and to twenty-four miles and the wide area of sea embraced in the King's Chambers in 1802, culminating in 1805 with three hundred miles in the case of certain ships (i.e. those belonging in whole or in part to British subjects or having crews more than half British) and the situation in 1922, when the United States had to meet a similar problem and claimed jurisdiction within limits of twelve miles, and he urges the inconsistency of the British Government, no longer suffering itself from smuggling round its shores, in objecting to the United States claims and maintaining that no such rights are exercisable outside the three-mile limit. In order, however, to be quite fair to the attitude of Great Britain it is necessary to point out, first (as the author to some extent does), that the British Government had, from 1850 onwards, become, upon the advice of its Law Officers, increasingly doubtful of its right to interfere with foreign vessels outside the limit of three miles, and after about 1856 had never exercised the powers given by its Statutes against foreign vessels outside those limits; secondly, that after the repeal of the old Acts by the Customs Consolidation Act of 1876, though limits of twelve miles and nine miles are retained, it is only in the sense that vessels which come into British ports after having done certain things *within these limits* (viz. broken bulk, &c.) are penalized and, except in regard to the coasting trade, no power is now given to interfere with a foreign vessel while she remains outside the three-mile limit. There is no inconsistency between the British Government's attitude in 1922 and its own legislation or actions at that time or for the last fifty years. It is not a claim to jurisdiction over twelve miles to provide that it is an offence to come into a British port having broken bulk within twelve miles.

The old Hovering Acts were passed at a time when Great Britain made claims to sovereignty over wide stretches of open sea. Are they to be regarded as instances of a special jurisdiction independent of sovereignty over the sea, or to be bound up with such claims to sovereignty? This is the real question. Soon after the claims to such sovereignty were, in accordance with the development of International Law, abandoned, the jurisdiction under these Statutes over foreign ships outside the limit of three miles was first tacitly not exercised and then repealed. The British Government, rightly or wrongly, appears to have acted on the view that the jurisdiction was not independent of sovereignty.

The United States Statutes, with their more modest twelve-mile limit, were

based originally on the old British Hovering Acts, and though the United States later adopted the view that three miles was the limit of territorial waters, these Statutes were not repealed but renewed. The theory of special jurisdiction is that on which these two things are reconciled.

It is not irrelevant, however, to note that, *speaking generally*, in the United States Statutes, as in the old British Statutes, no limit is defined as that within which vessels may be stopped or seized. The twelve-mile limit is adopted as the area within which it is an offence to do certain things, and the application of this limit for the purposes of determining where interference or seizure may take place is largely a matter of interpretation on the part of the executive and judiciary (it has been held that American vessels may be seized *anywhere*, but foreign vessels only within twelve miles), and this interpretation seems to be of recent date. It is far from clear, moreover, that other countries, which make claims to jurisdiction in a wider belt than three miles, do so upon any theory of special jurisdiction, or do not do so upon the basis of a claim to sovereignty. However this may be, Dr. Masterson's theory is at any rate well worth consideration as a compromise to reconcile the existing divergent views, and his work is well timed and useful.

Le Gouverneur dans les Dominions britanniques. By Henri Couve de Murville, Docteur en Droit. Paris: Rousseau & Cie. 1929. 205 pp.

The author is to be congratulated on this little book. The position of the Governor in the British Dominions is, as Dr. de Murville says, one of great interest as being one of the chief links with the mother-country. The Governor is the embodiment, from the executive point of view, of the supremacy of the central Government, just as the Imperial Parliament and the Judicial Committee of the Privy Council are the means by which the legislative and judicial supremacy may be enforced.

A study by a French scholar of the status of the British Governor is in itself of great value. He can perhaps bring to the subject a more detached point of view than could a British author, and certainly this book gives us a most valuable and critical sketch of the present position. In fact it is to be regretted that this volume does not contain rather more detail. To the student of International Law perhaps the most interesting chapter is the last, where the author most ably discusses the position of the British Empire from the international point of view. He shows very clearly the impossibility of finding a legal definition for the anomalous position of the Empire, a position which at present may easily lead to confusion and misunderstanding.

In conclusion, we can only say, firstly, that every constitutional and international lawyer may rest assured that this book will well repay reading, and, secondly, suggest that future editions of this work might well contain an index.

H. C. W. T.

Handbuch des Abrüstungsproblems, herausgegeben im Auftrage des deutschen Studienausschusses für Fragen der Friedenssicherung von Professor Dr. Th. Niemeyer (Rothschild, Berlin: 3 volumes).

This comprehensive combined study of the problem of disarmament, under the editorship of Professor Niemeyer of Kiel, is well worthy of attention. Of the three volumes, the first deals systematically with the subject; the second con-

tains documents covering the period 1816 to 1919; while the third contains the documents of the League of Nations on the subject. The documents are mostly in French.

The first volume is divided into seven sections:

1. The Problem, by Niemeyer.
2. An historical *aperçu* from the Military Point of View, by Vice-Admiral Hopman.
3. Land-armament, by General von Kuhl and Lt.-Col. Garcke.
4. Sea-armament, by Captains Vanselow and Gadow.
5. Air-armament, by Baeumker.
6. The Economic Point of View, by Colm.
7. International Law and Disarmament, by Simons and Jahrreiss.
8. Politics and Disarmament, by Bartholdy.

Niemeyer, dealing with the history of the movement, is at pains to point out that *désarmement* must be understood relatively and be taken to mean rather limitation of armaments, and that the literature of the subject regards complete disarmament as the result of peace rather than as its cause. The views of Kant and Bentham are dealt with at some length, and it is suggested that these have not received the attention they deserve. (Bentham, it will be remembered, proposed that France and England should emancipate their dependencies, revoke their treaties of commerce and alliance, and reduce their fleets to forces just sufficient to defend their commerce against pirates.) It is interesting to find a reference to Peel's proposal because, as will be suggested later, the inculcation of what may be called the *police idea* must be the first step in the evolution of real pacification.

The editor distinguishes between official peace movements on the one hand and pacifist movements on the other, suggesting that the latter reverse the true order of things in pretending that peace will *follow* disarmament. He says the question is how far treaties on limitation of armaments are desirable or possible. Two solutions present themselves: security first, then disarmament; and vice versa. The latter notion is of recent origin.

Noel Baker is quoted, according to whom frontiers, as well as customs barriers, account for the armed condition of Europe and its commercial inferiority to the United States of America.

The League of Nations' questionnaire of December 12, 1925, was examined by the Kiel Institute of International Law, who were of opinion that it is not technical military considerations which hamper the establishment of armament limitation. It is the political preparatory work which is lacking, as also the universal will to disarm.

Vice-Admiral Hopman points out that England always leaves the initiative in the disarmament question to others. He deals with the Hague Conferences and mentions that the British Preparatory Committee for the Third Peace Conference held that the easiest form of armament control would be an agreed limitation of budgets.

Von Kuhl and Garcke examine the post-war armies—giving figures—and point out that the Central Powers were disarmed as a first step towards universal disarmament. (This is of course in a sense true—see preamble to Part V, Treaty of Versailles—and it is unfortunate that such a reason, if reason it can be called, should have been given. To begin with, it is not known that peace will follow

disarmament. And secondly, the real reason might as well have been given, viz. that the Central Powers were disarmed just as any other disturber of the peace might be by the police.) They go on to complain that the disarmament of the other side has not followed. A black picture is painted of Germany's insufficient forces and of the destruction of material, the work of destruction itself costing £500,000. Krupps' losses amounted to £5,000,000.

According to Simons and Jahrreiss, the question is one of limitation of armaments secured by pacts freely entered into, but the nightmare that disarmament may lead to the Superstate holds many back. These contributors reiterate that imposed treaties should not be recognized. They seem to forget that the document signed by victor and vanquished is called a treaty by way of politeness. But to say that there should be no such document is as though one should say that a captured officer should not be asked to give his parole.

Unhesitating approval will be given to the pronouncement that "Any State starting war must be placed in the moral position of aggressor and be treated as a rebel by the community of nations".

The *leitmotiv* of the book is Germany's defenceless state. Her disarmament is only lawful if other states follow suit. Germany never really wanted war, but competitive shipbuilding was forced on her on account of England's inability to understand her moderate schemes of colonial development.

The question of the police force is, as it seems to us, dealt with somewhat perfunctorily; nor is the important point touched upon that armed police are, according to English ideas at least, in many respects indistinguishable from the military, that armed police will presumably be required so long as civilians are allowed to carry firearms, and that the practical way to inculcate peaceful notions is to enforce strict regulations as to the possession of firearms. This may have been at the root of our suspicions of the German argument for the necessity of a large force of police, an argument which loses a good deal of force when it is shown, as in our General Strike, that a rising, where the possession of firearms is strictly controlled, can be quelled with no more bloodshed than a few broken heads. It will be remembered that the last Portuguese rebellion was speedily suppressed when the civilian population were allowed forty-eight hours in which to give up their firearms and explosives, after which any civilian found in possession of such incurred the death penalty.

TEMPLE GREY.

Le Rôle du Conseil de la Société des Nations dans le Règlement pacifique des différends internationaux. By A. H. Philipse. Martinus Nijhoff, The Hague, 1929. pp. viii+285.

This book is well written, well arranged, and well printed; it has a good table of contents, a good index, and useful citations of source material in its appendices. It deals with a subject-matter in itself of great importance, and doubly so by reason of the fact that it is part of that new but rapidly evolving branch of the Law of Nations which certain learned authorities have described by the name of "Constitutional International Law". The author has at his disposal a large body of new rules of general International Law, and a very considerable body of practice in which these new rules have been actually applied. He has, moreover, a virgin field in which to work; no one before him has made a general study of these rules in their operation. Which is to say that M. Philipse has chosen his subject well, and that a comprehensive dealing with that subject is urgently required.

But that is the best that can be said for M. Philipse. His book, as a whole, is disappointing, both in its substance and in the method which he adopts. It is plain that no study of the new rules regarding international disputes can be satisfactory unless it is based on the facts of the actual practice of which mention has been made. Yet M. Philipse hardly deals at all with the practice of the Council. The historical illustrations of his theories which he gives us are few and not always happy. To the work of the Military Commission in the Greco-Bulgarian dispute of 1925—a classical precedent in the history of the Council's work—he devotes a single sentence. Of other Commissions which the Council has set up he makes no mention at all. Even his list of the disputes which have been brought before the Council is strangely incomplete.

Nor in its exposition of simple theory is this book a safe or a satisfactory guide. The doctrine which it puts forward of the Council as the "organe directeur" of the League is at least open to dispute. Although it is published in 1929, it makes no reference to the Pact of Paris for the renunciation of war, and the "gaps" in Article 15 of the Covenant are discussed at great length without any suggestion that the Pact may have modified either their legal or their practical effect. Again, the explanation given of the significance of paragraph 8 of Article 15 is unlikely to receive acceptance: and the author's discussion of the practical effect of this paragraph is vitiated by the fact that he fails to realize what is certainly true, that the Council could never apply it without seeking an advisory opinion from the Court. Similarly his observations about the "competence" of the Conference of Ambassadors in the Corfu dispute omit the essential historical fact, which is that both parties to that dispute had submitted their difference to the Conference and accepted its arbitral decision in advance, before either of them had approached the League. M. Philipse also appears to exaggerate the practical importance of the new tendency to make Conciliation Treaties—so far a mere tendency of theory unsupported by any practical use of the Conciliation Commissions which these treaties create. He is surely wrong in regarding such treaties as a serious rival to the Council as a method for dealing with disputes.

It must, however, be added that many of the main conclusions which M. Philipse reaches about the functions and future of the Council in connexion with international disputes appear to the reviewer to be right. In some ways, therefore, the book is useful. But it is not the work of "international constitutional law" that is required.

PHILIP J. NOEL BAKER.

Classics of International Law. Pufendorf. "*De Officio hominis et civis juxta legem naturalem libri duo.*" Two vols. (Vol. I, 30+164 pp.; Vol. II, 27+152 pp.). Oxford University Press, American branch. (\$4.00.)

The first volume contains the text, photographically reproduced, published at Cambridge in 1682, with an introduction in German by Dr. Schücking. The second volume contains a translation of Dr. Schücking's introduction by H. F. Wright, and a translation of the text by F. G. Moore, with an index to the contents of the text.

This is an excellent edition of the third of Pufendorf's important works, his two books on the duty of a man and citizen. Dr. Schücking's introduction is most useful for the purpose of placing the work in its appropriate setting and showing the extent to which it contributed towards the modern conceptions of international law.

C.

Rivalry of the United States and Great Britain over Latin-America, 1808-1830. By J. Fred. Rippy. Baltimore: The Johns Hopkins Press. London: Humphrey Milford, Oxford University Press. x+315 pp.

This book is largely based on the reports, which are extensively quoted, written by British and American agents, officers, and diplomatic representatives in South America in the period under review, and on the instructions sent to them by their respective Governments.

Professor Rippy first deals briefly with the Louisiana purchase, the Florida purchase, and the origin of the Texan and Cuban questions. He then deals with events in Chile, Brazil, Buenos Aires, Peru, Great Colombia, and Central America, and in each case the rivalry between the two countries is viewed through the eyes of the men on the spot. Some account is given of the Panama Congress of 1826, and an interesting chapter is devoted to the spirited diplomatic duel in Mexico of 1824-30.

The principles underlying the policy of the two countries as expressed by their protagonists, Canning and Adams, are not lost sight of. The fundamental identity of aim is striking. Both countries adhered to the principle of non-intervention, both favoured freedom of commerce and did not aim at special commercial privileges for themselves. Both men desired recognition, and in both cases recognition was delayed. Canning was held back by the political situation at home and in Europe, Adams by anxiety to complete the Florida purchase. This similarity of aim was obscured by the different political circumstances of the two countries: Great Britain favoured constitutional monarchy in South America, the United States republican institutions. Canning is concerned to encourage a European connexion and to prevent the economic and commercial isolation of South America from Europe. Adams writes to his Minister at Buenos Aires that it is in the interests of both Americas that the new states should be governed by republican institutions politically and commercially independent of Europe. On the whole the divergence was political rather than economic. As Professor Rippy points out, in the commercial sphere the element of competition was largely absent. The United States exported raw materials, Great Britain exported manufactured goods. The United States had insufficient capital to invest outside her own borders, while British capital found a ready outlet in South America.

The real bone of contention was the carrying trade, and the rivalry, such as it was in this period, was a rivalry of two maritime nations who saw in South America a key position. The United States were concerned to break down the old navigation system and to maintain neutral rights at the maximum, Great Britain to consolidate her dominant position as a naval and seafaring Power. Great Britain viewed the situation as a prospective belligerent, the United States as a prospective neutral, and it is significant that both Canning and Adams instructed their delegates to the Congress of Panama to put forward the thesis of their respective countries as to the nature of maritime rights. The unsolved problem of the Ghent negotiations was destined to remain an important factor in Anglo-American relations.

The grasp of these principles puts the wrangles and jealousies of the men on the spot in a proper perspective. These men were engaged in pushing trade, in negotiating commercial treaties, and in supporting the political party which seemed to favour the views of their principals. In the turmoil of South American politics friction between representatives was inevitable, and their rivalry some-

times exceeded the real rivalry between their countries almost as much as the representatives themselves sometimes exceeded their instructions. It is therefore open to doubt whether Professor Rippy's method, though it adds interest to his book, does not tend to magnify the extent of the rivalry and the real divergence of policy between the two countries in the period under review. R. M. M.

The Doctrine of Necessity in International Law. By Burleigh Cushing Rodick. Columbia University Press, New York, and Humphrey Milford, London, 1928. pp. 195. (£1.)

Mr. Rodick's book is modest in size—only 120 small pages of text—but it is the result, so he tells us, of five years' labour, and the nine pages of bibliography are certainly impressive. The cover emphasizes its importance by saying that "the writer also recognizes that the ideas of necessity and self-defence have been among the greatest obstacles of international peace; and for the first time in any book he has analysed these principles and explained the limitations that should be imposed upon their lawful exercise".

After all this it is disappointing to find that Mr. Rodick has fallen into the same confusion of thought which he deplors in his predecessors. He groups so many cases under the general heading of "necessity" that the word ceases to have any meaning as a distinct legal classification. Sometimes necessity may compel us to violate the legal rights of others; at other times it may compel us to assert our own. Mr. Rodick's essay is marred by a persistent confusion between these two distinct ideas. As examples of the doctrine of necessity he is continually citing cases where a state finds it necessary to assert rights clearly recognized by law and practice, such as intervention, reprisals, pacific blockade, and the right of requisition. Even claims to be released from treaty obligations under the plea of *rebus sic stantibus* are viewed by the author as examples of reliance upon the doctrine of necessity. Again we are told (p. 74) that "military necessity may also excuse the action of a belligerent in refusing, at least temporarily, to grant a suspension of arms, a truce, or an armistice". Does this mean that normally there is any such thing as a legal right to an armistice?

Mr. Rodick sees no difference between the Allied and the German declarations concerning maritime war zones, nor, again, between the German invasion of Belgium and the Allied landing at Salonika. With reference to the latter a few words deserve quotation (p. 114): "Regardless of the attitude of the Greek Government, it is clear that there was no legal justification for the action of the Allies. The plea of Sir Edward Grey in the House of Commons brought forth from one of the members the cry of 'Another Belgium'." It is not easy to see how a question of neutrality can be decided regardless of the attitude of the neutral Government, and the citation of ejaculations in the House of Commons seems out of place in a work which professes to be a scientific analysis of a difficult legal problem.

Unfortunately, a fairly definite anti-British bias must be reckoned among the defects of Mr. Rodick's book. For example, the attack upon the German cruiser *Dresden* is condemned as an unwarranted assertion of the doctrine of necessity, although it was a clear case of a legal right created by the inability of the local authorities to enforce the laws of neutrality. On the other hand, the author seems to have some sympathy for the German arguments in favour of unrestricted submarine warfare, which he quotes with unusual fullness. He concludes his

discussion of this matter by saying (p. 93): "It would, nevertheless, appear that the entire problem calls for reconsideration and a more detailed examination than can be given within the limits of this treatise." H. A. S.

Aerial Bombardment and the International Regulation of Warfare. By M. W. Royse. New York: H. Vinal, Ltd. 1928.

The titles of the chapters of this book are: I. The Regulation of Military Interests. II. Prohibition of Aerial Bombardment at the First Hague Conference. III. Aerial Bombardment—The Second Hague Conference. IV. International Regulation of Warfare. V. Rules of Bombardment. VI. The present Status of Aerial Bombardment. There is a good bibliography and there is an index which is less complete.

The treatment is in the main historical. The author has clearly taken great pains to collect and record, with the necessary references, all the available information relating both to the legal and to the technical side of his subject. He traces the development of flight itself as well as the efforts made to prohibit or control the use of aircraft—at first lighter-than-air, subsequently heavier-than-air also—as instruments of bombardment. The historical review is followed by a discussion of the general principles governing the admissibility of destructive weapons of war.

The rules applicable to bombardment in land and sea warfare are explained. The practice of the various belligerents in regard to air bombing in the Great War is described. Finally, the rules upon this subject proposed by the Commission of Jurists who met at The Hague in December 1922–February 1923, under the chairmanship of Judge Bassett Moore, are stated and analysed.

The author's conclusion is that air bombardment can be regulated only according to the principle of the "military objective". "It cannot reasonably be affirmed to-day that it is wrongful or illegal to bombard a military objective, fairly regarded as such, by all available means of attack; nor does a military objective lose that character merely because it is situated in the midst of a crowded city remote from the immediate zones of land objectives" (p. 241). "If an objective is of such a character as to be properly designated a military objective, no artificially created zones will prevent its bombardment" (p. 233).

With this conclusion the present reviewer entirely agrees. He agrees also with Dr. Royse's view that the question of what actually constitutes a military objective remains to be decided. He disagrees emphatically, however, with one statement made by Dr. Royse, in so far as that statement is general and applies to the action of the British Air Force. The statement is that cities and towns, not military objectives therein, were the real targets of bombardment in the great war. "An individual town, as a unit, was made the objective, such as in the Rhineland region" (p. 187). That statement is untrue of the British raids.

The reviewer has been privileged to see the records (not published) of the ascertained results of the bombing by British aircraft of the Rhine towns in 1918. The results were verified by a commission which visited nearly all the bombed towns and inspected the mayoral and police reports upon the raids, in addition to making inquiries of the directors of the factories and collecting other information. The evidence is most instructive. It shows beyond any question that it was the military objectives (railways of importance for war supplies, chemical works, blast furnaces, munition factories) which the raiders sought to attack and that, though

non-military property often suffered, a genuine attempt was made to confine the bombing to such objectives and to prevent it from becoming indiscriminate.

The twin factory towns of Mannheim and Ludwigshafen were bombed repeatedly. The ascertained results, as charted, show the bomb-falls predominately on the left bank of the Rhine in and around the Oppau Chemical Works and the Badische Anilin und Soda Fabrik. It is true that Mannheim itself, on the right bank, received many bombs, but the great works on the other side received many more. Indeed, the casualty figures are eloquent of the care taken by the raiders to avoid the residential quarters. During 1918, 23 persons were killed and 62 wounded in Ludwigshafen—an extraordinarily small total for eleven raids. 510 people were killed and wounded in the cruiser raid on Hartlepool on December 16/17, 1914, 594 people in the *Gotha* raid on London and south-east England on June 13, 1917. Our aircraft could easily have done more damage to non-military elements, human and material, if that had really been their object.

There are, however, in this useful book few statements to which exception can be taken. It is a valuable contribution to the literature of its subject.

J. M. SPAIGHT.

Siam Treaties with Foreign Powers, 1920–1927. Edited by Phya Kalyan Maitri (Francis Bowes Sayre). Plimpton Press, Norwood, Mass. 280 pp.

Between 1920 and 1927 the Siamese Government negotiated with the Powers who had previously possessed ex-territorial rights in Siam a series of treaties the effect of which was to restore to her complete autonomy in tariff and fiscal matters, and to abolish, subject to one small and temporary exception, such ex-territorial jurisdiction as persisted since the earlier treaties negotiated about twenty years ago. This book is a collection of these recent treaties, edited, without comment, by Dr. Francis Sayre, who was until recently legal adviser to the Siamese Ministry for Foreign Affairs and in that capacity negotiated the treaties in question. The treaties are important as showing the final stage of the process by which Siam has succeeded in recovering her fiscal and jurisdictional autonomy, but their actual provisions are not of great interest, with the exception of the provision which confers upon the Powers concerned the right to “evoke” any case pending in a Siamese Court in which one of their nationals is a party, in order that it may be dealt with by the diplomatic or consular official of the evoking Power. This right is the last remaining vestige of ex-territoriality, but it is to come to an end five years after the putting into force of all the Siamese codes. In the case of Great Britain this right has existed since the treaty of 1909 by which British ex-territorial jurisdiction was effectively surrendered in Siam, but it has rarely if ever been found necessary to make use of it.

Dr. Walter Schätzel, *Die elsass-lothringische Staatsangehörigkeitsregelung und das Völkerrecht. Eine rechtsvergleichende Studie der Probleme der Staatsangehörigkeitsregelung bei Gebietsveränderungen.* 216 pp. 1929.

Dr. G. Streit, *Der Lausanner Vertrag und der griechisch-türkische Bevölkerungsaustausch.* 71 pp. 1929.

Dr. Michael Freiherr von Taube, *Russland und Westeuropa (Russlands historische Sonderentwicklung in der europäischen Völkergemeinschaft).* 63 pp. 1928.

Dr. Schätzel's interesting and suggestive monograph serves two purposes: One is to analyse, in the light of existing rules of international law, the provisions

of the Treaty of Versailles relating to nationality in Alsace-Lorraine, and to reveal the difficulties and complications caused by their exceptional character. The other is to discover how far they embody the new tendencies on the part of International Law concerned with changes of nationality following upon territorial changes.

Although the author is obviously at pains to avoid a political discussion, the first part of the book is marred by somewhat unnecessary recriminations. Article 51 of the Treaty of Versailles laid down: "The territories which were ceded to Germany in accordance with the Preliminaries of Peace signed at Versailles on February 26, 1871, and the Treaty of Frankfurt of May 10, 1871, are restored to French sovereignty, as from the date of the Armistice of November 11, 1918." Dr. Schätzel shows much thoroughness and ingenuity in revealing the flaws and inconsistencies of the provision as to the retroactive effect of the Treaty as well as of the other provisions of the Annex to this Section. He gives a detailed account of the much criticized, and subsequently abandoned, ruling of the Franco-German Mixed Tribunal to the effect that the inhabitants of Alsace-Lorraine were "virtually" French citizens before the Armistice and not subject to German law during the World War.

The second part of the book is suggestive and constructive throughout. The Treaty of Versailles protects the married woman born in Alsace-Lorraine from losing "the benefits of her origin" through marriage, and Dr. Schätzel shows how this sanctioning of the separate nationality of husband and wife has been imitated in the German-Polish Convention concluded in Vienna in 1924, and how the new tendencies have found expression in the legislation of the United States and of Soviet Russia. In the latter, a law passed in 1924 abolishes any effect of marriage upon the nationality of the wife. Dr. Schätzel's observations on double nationality are interesting. He is not at all anxious to do away with double nationality, and he regards it as a natural measure of self-protection adopted by the individual in an age of expropriations, liquidations, and expulsions following upon the Peace Treaties. Perhaps the learned author should have added that this is not the opinion of the Mixed Arbitral Tribunals which had to deal with this question. They adhere to the view that the status of double nationality is an abnormal one and incompatible with the Peace Treaties, and that it is the duty of the tribunals to solve the conflict of nationalities by applying the so-called principle of active nationality, which takes as a test such factors as where the persons in question were domiciled, where they conducted their business, and where they exercised their political rights (see, for instance, the cases *Baron Frederick de Born v. Yugoslavia* and *Berthez de Montfort v. Treuhander Hauptverwaltung*, both reported in the *Annual Digest of Public International Law Cases*, 1925-6). There are other views in this book which are open to criticism, but this in no way diminishes the value of a highly original monograph, the character of which may perhaps be fittingly illustrated by one of the author's final suggestions. He says: "States have since many years been grappling with the question of creating territorial guarantees in international law. A remedy, more effective than all political guarantees, would be the establishment of a rule that the individual has a right to the place of his residence and to the land which he owns, and that he has the right to remain on it and to choose his nationality regardless of disputes between Governments. If it were possible to establish this rule as part of international law . . . then no state would dare to annex large portions of foreign

territory, seeing that it would have to take into account the possibility of the population retaining *en masse* the nationality of the state to which it belonged before the cession."

Professor Streit's paper on the exchange of Greek and Turkish populations as provided by the Treaty of Lausanne will be read with advantage by those interested in this perhaps most extraordinary of the post-war settlements. Dr. Streit, who was Greek Foreign Minister for a long time, speaks both with detachment and with the insight of an experienced statesman. His condemnation of the "exchange of populations" is therefore doubly impressive. The solution adopted, he says, was injurious to both parties; it was an Asiatic solution. He is no doubt right when he points out that the settlement, far from being an application of the principle of protection of minorities, constituted a rejection of it. Dr. Streit supplies an interesting piece of information by revealing that the idea of compulsory exchange of populations was first discussed in London in 1913 during the negotiations between Bulgaria, Greece, Montenegro, Serbia, and Turkey, and that it was embodied in the treaties of Constantinople and Adrianople in 1913 in respect of certain limited frontier areas.

Baron Taube's paper is an essay on Russia's historical position in the European community of nations. He stresses the importance of the bonds uniting Russia with Western Europe, not only on account of affinity of race, of community of Christendom, and of economic interests, but also because Russia has formed part and parcel of the European system of states since Peter the Great. He recalls the contribution of Russia to the development of International Law by her "humanitarian interventions", by her part in the "armed neutrality" of 1780, and her leadership in the attempts at international organization from the Holy Alliance to The Hague Conferences.

The three monographs here reviewed are published by the Institute of International Law at the University of Kiel, and edited by Professor Schücking in a useful series.

H. L.

Les Immunités diplomatiques des représentants des états Membres et des agents de la Société des Nations. By Jacques Secretan. 1928. Librairie Payot et Cie., Lausanne. 8vo. 120 pp.

This is an essay on the immunities from the local jurisdiction to which representatives of states belonging to the League and also officials of the League are entitled under Article 7 of the Covenant when they are engaged on the work of the League. The author, if we mistake not, is himself a member of the Secretariat of the League, and has, therefore, had ample opportunity of studying at first hand the practice which has grown up at Geneva since the head-quarters of the League were established there.

After a brief introductory statement as to the meaning of the term "diplomatic immunities" and as to cases where by special agreement diplomatic immunities have been conferred upon the members of certain international organizations, such as the Permanent Court of Arbitration at The Hague or the various International Commissions which control the navigation on certain rivers, the author devotes the first section of his book to a detailed consideration of what is meant by the phrase in the Covenant "representatives of Members of the League engaged on the business of the League". Then comes a corresponding section dealing with the categories of officials who are included in the phrase

"officials of the League". The last section indicates the immunities and privileges which they enjoy.

The framers of the Covenant can have had but little conception of the breadth of the field over which the principle laid down in Article 7 of the Covenant would operate. The principle itself is clearly right. The greater part of the work of the League is certainly diplomatic in character; it has to do with the relations between states, and men who are engaged on such work should, in respect of their official duties, be immune from the local jurisdiction; but as the work of the League grows there come into being classes of representatives whose position is scarcely such as to bring them within the letter of Article 7, if strictly construed, but in favour of whom it certainly should operate. Apart from those who come to attend the meetings of the Council or the Assembly or the Labour Conferences, there are the members of the technical and consultative committees, the staffs of the permanent delegations maintained by many states at Geneva, and representatives of states which are not Members of the League, but send delegates to attend special conferences or meetings in which they are interested.

If Switzerland ever enacted a prohibition law, it would surprise people to find how large a section of the population of Geneva could claim exemption from its operation.

The officials of the League are by no means confined to Geneva. There are branch offices in London and Paris; there are High Commissioners and their staffs at Danzig, administrative officials in the Saar, refugee officers in the Balkans. There have been men engaged in financial reconstruction in Austria and Hungary, or hygienic work in Poland or Singapore. For all of these the question may arise: are they entitled to the benefit of Article 7?

The chapter which Dr. Secretan devotes to the question of the extent to which Article 7 operates to the benefit of persons enjoying the nationality of the country in which they are present is particularly useful. The right of an individual to diplomatic protection against his own Government would have seemed inconceivable to an international lawyer of fifty years ago, but with the creation of bodies whose officials may have to hold the balance even between disputing Governments, one of which may happen to be their own, it has become a necessity and is now generally admitted. It is fortunate that the Swiss Government have taken a broad view of the situation. The author gives detailed information as to the agreements which have been concluded between the League and the Federal Government at Berne as to the privileges accorded to the various categories of officials of the League. These agreements show on both sides a willingness to meet the reasonable demands of the other side.

Altogether, a very useful little book.

C.

The Development of European Law. By Munroe Smith, late Bryce Professor of European Legal History in Columbia University. Columbia University Press, New York, 1928. (20s.), xxvi+316 pp.

The lectures delivered by Professor Munroe Smith at Columbia University on the subject of Comparative Legal History are collected in this volume, and lawyers of this country, no less than those of the United States, should be grateful for the appearance of this useful work. Quite apart from its interest to scholars, the importance of Comparative Legal History lies in the fact that it furnishes a valuable corrective to a very dangerous tendency which has at times brought

the subject of Comparative Law as a whole into disrepute. The process of comparison, if it is to have any real value, must preserve a proper perspective, and legal institutions, in particular, should only be compared, so far as possible, when they have reached an identical stage in their development. The chronological method of comparison often leads to very unfortunate results.

The difficulty which faces the student has, however, always been twofold. In the first place the area covered by the Legal History of Europe is so vast that it is well-nigh the work of a lifetime to master it with any degree of thoroughness. Further, the enterprise is one which calls for an intimate knowledge of at least four European languages, unless the student is content to collect his material in a second-hand form from various encyclopaedic works which deal with the subject.

The learned author of the volume under review was unusually well equipped to deal with his task. As Judge Bassett Moore points out in his foreword, Munroe Smith was a scholar in the "highest and best sense", and, moreover, possessed in a marked degree the power of analysis and of lucid exposition which is essential to the preservation of the principles underlying a very involved if not chaotic topic such as that of Comparative Legal History. His object was to follow out the main lines along which the development of private law proceeded in western continental Europe from the fall of the western Roman Empire until the present day. His lectures now published in this volume will enable the student to grasp the essentials of a very difficult and complicated subject. At the moment this work is in complete possession of the field, though it is to be hoped that other English-speaking scholars will take up the task at the point to which Munroe Smith had carried it. As is to be expected in a book which deals with a very big subject within a relatively small compass, the conclusions of the learned author often take the form of generalization unsupported by any reference to authorities, but this is inevitable, and does not detract from the inherent value of his work viewed in the light of the purpose which it was intended to achieve. One notices here and there certain orthographical errors and oddities of expression which appear to have escaped the attention of the revisers of the manuscript of the lectures. These slight blemishes will no doubt disappear from subsequent editions of this very able work, which is a valuable contribution to the literature of Comparative Law.

H. C. G.

L'Entr'aide Répressive Internationale et la loi française du 10 Mars, 1927. Par Maurice Travers, Avocat à la Cour de Paris, &c. (1928.)

In this work the learned writer has two purposes in view—to trace the outlines of French law in regard to extradition and other measures of mutual aid for the repression of crime, and to further the development of a uniform system of international procedure in such matters. Crime is world-wide, and demands world-wide measures for its suppression; failure to meet growing needs, tedious formalities, and obsolete methods are harmful to all, most so indeed to the state which may thus harbour criminals. In some respects the writer's suggestions correspond with those of the Royal Commission on Extradition of 1878.

The law of March 10, 1927, is the first French law relating to extradition, though treaties have force of law. Article 1 provides that, in the absence of a treaty, the conditions, procedure, and effects of extradition are determined by that law, as are also points not regulated by treaties. Thus, while it in no way

modifies existing treaties, the law supplements each, and it admits of future treaties divergent therefrom. As the writer observes, a frame to which all future treaties must be adapted prevents growth.

The preparation of this law was, it is shown, dominated by the wish to contribute to the realization of the work of unification which the Committee of Experts appointed by the League of Nations have deemed premature. M. Travers regrets this decision, and points to schemes drafted elsewhere, and to multi-lateral treaties already in existence in America. He hopes, therefore, that the League may again, ere long, take up the question in its entirety.

In this volume the author sets out the essential principles underlying extradition, and examines in detail French law and practice in regard thereto, bringing into comparison, with a wealth of quotation, the laws and practices of other nations. In this review, so-called Anglo-Saxon conceptions come into relief—*prima facie* proof of guilt prior to surrender, enumeration of extraditable offences in treaties, and willingness, if qualified, to surrender nationals—tendencies elsewhere being to treat extradition as an administrative process, to make offences extraditable (as in the new French law), if subject to a specified minimum penalty, and unwillingness to surrender nationals.

But while the reconciliation of such differences, and the attainment of a complete and effective co-operation between nations in the struggle against crime, must doubtless be of slow development, the writer sees no reason why a beginning should not be made by the conclusion of a general treaty in respect of grave offences such as assassination, murder, arson, robbery, swindling, &c., which are covered by most laws and nearly all treaties. This, he considers, would be a first and most useful step; pressure of needs and practice would in time lead to others; while even where divergences existed, these seem capable of being bridged, and are indeed bridged in some existing treaties. Subsidiary matters, such as the taking of evidence on commission, &c., present fewer difficulties, and it is noted that the Committee of Experts at Geneva are at present engaged in the study of certain of these, and also that a general treaty for the suppression of counterfeiting of currency has already been drafted under the auspices of the League.

The appendices contain the French law of March 10, 1927, all existing treaties concluded by France, and the draft articles on extradition prepared by the International Committee of Jurists at Rio de Janeiro in 1927. H. R.

Le Continent Américain et le Droit International: par Francisco Jose Urrutia. Rousseau et Cie, Paris, 1928. pp. xviii + 404. (70 fr.)

It is by no means easy for European students to understand the South American attitude towards questions of International Law, and M. Urrutia's book should prove of great help in so far as he enables us to study this attitude in proper historical perspective. He tells us of Bolivar's unrealized vision of a great confederation, and the record of the ensuing century is largely the story of successive attempts to create an ordered and stable world in the continent by means of the formulation of International Law. More realist than most of his compatriot scholars, less realist perhaps than his friends in Europe, M. Urrutia serves admirably as a liaison officer between his own continent and ours.

Indeed, the story, as he tells it, sounds strangely unreal in our ears. We are given no record of actual conflicts settled by diplomacy or by war. We do not see the substance of International Law being gradually hammered out by expe-

rience on the hard anvil of practical needs. Of arbitration treaties, general and particular, we are told much, but we do not see the tribunals in the act of applying principles of law to the solution of actual controversies. The picture presented to us is very different—a picture of the unceasing output of conventions, resolutions, and draft codes of International Law.

Readers of this *Year Book* will recall Professor Brierly's acute analysis¹ of the draft code drawn up by the American Institute of International Law at Lima in 1924. It is satisfactory to learn from M. Urrutia that some of the more extravagant pronouncements of Lima have been considerably toned down by the "Congress of American Jurists" which met at Rio de Janeiro in 1927, though the work of that body still invites some of Professor Brierly's criticisms. The draft conventions drawn up at the Havana Pan-American Conference of 1928 seem to mark the achievement of yet another stage along the pathway to reality.

South America has now occupied itself with the problem of codifying International Law for more than a hundred years, and experience, as M. Politis remarks in a very interesting preface, is undoubtedly producing good results. In particular, the establishment of the League of Nations has brought South American statesmen into close contact with world problems, and has helped to destroy the dangerous notion of a separate body of "American International Law". As we read the long story of resolutions and conventions we may be tempted to grow impatient with an idealism which seems so remote from realities, but it is good for us to remember that we have trodden the same road ourselves. Grotius laid the foundations of modern International Law during the course of the most horrible war that civilized man has seen, and for long after his time theory seemed to be hopelessly divorced from practice. As civilization has improved, so the gap has been steadily abridged. It may be that in South America also the long prevalence of violence and disorder has tempted educated and humane men to turn their eyes towards ideals that were as remote as possible from disagreeable realities. Indeed, the reign of law is the consequence of order rather than its cause. Abstract assertions of "fundamental rights", whether national or individual, spring up most easily amid the tumult of wars and revolutions, but the codes of positive rules which men obey are the work of strong and settled authority. So we may welcome the recent tendency of South American jurists to discard the general for the particular, and to seek the basis for rules rather in the best practice of states than in deductions from abstract doctrines of sovereignty and independence. It is not by the resolutions of Pan-American Conferences, but by wholehearted participation in the common life of nations, that South America will make her contribution to International Law. H. A. S.

¹ *B.Y.I.L.*, 1926, p. 14.

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INDEX

- Aboulloff v. Oppenheimer*, case of, 259
- Alabama Arbitration, international law of damages as applied in, 83
- Alien property, international law and (Alexander P. Fachiri), 32-55
- Aliens, fundamental rights of, 33
- Ambassador the representative of the Sovereign, 3
- not subject to local jurisdiction, 3, 4
- Annual Digest of Public International Law Cases, 226
- Anzilotti, M., tribute paid to Lord Finlay by, 193
- Arbitration between Reparation Commission and the United States* case, 45
- , proper subjects of, 17
- , tribunals, international, members of in relation to diplomatic immunities, 6, 7
- Arbitration Tribunals*, mixed, members of, not entitled to diplomatic immunity, 8
- Arbitrations on international postal questions, 178
- Armenia, intentions of the Assembly of the League about, 139
- Armytage v. Armytage*, case of, 257
- Attorney-General for Alberta v. Cook* (1926), case of, 247
- Austrian Pensions (State Succession)* case, 69 n.
- B. E. Chattin*, case of, 183 n.
- Bacon, Ruth, British Policy and the Regulation of European Rivers of International concern, 158-70
- Banner Milling Co. v. State of N.Y.* (1925), case of, 39 n.
- Becker v. Philadelphia and Reading R. R.* (1896), case of, 39 n.
- Behring Sea arbitration, international law of damages as applied in, 83
- Belgian case bearing on privileges of foreign diplomatic representatives, 12
- Belgian Treaty with China and extra-territoriality, 56
- Belgian Treaty of 1865 with China*, denunciation of, 122-8
- Belgium, German violation of (1914), 117
- Bellot, Dr. H. H. L., obituary notice of, 204-6
- Bentwich, Norman, The mandate for Palestine, 137-43
- Betsey*, case of the, 66 n.
- Bibliography, 291
- Bilateral Convention for the Pacific Settlement of International Disputes, draft (Geneva, 1928), 14
- Black Sea, Russia and her treaty obligations as to, 113, 114, 115, 116
- Bolivia and Paraguay and the Permanent Commission of Conciliation, 107
- Bolshevik revolution and the confiscation of property, 45
- Bones, international agreement relating to, 228
- Bosmans, C. J. E., et Visser, M., Répertoire des traités et des engagements internationaux concernant les Pays-Bas (Rev.), 263
- Bosnia and Herzegovina, Austrian annexation of, 116
- — before 1908, status of, decisions on, 69 n.
- Boundary Waters Treaty of 1909, 147 et seq.
- Bradford Corporation v. Pickles* (1895), 154 n.
- Brierly, J. L., some implications of the Pact of Paris, 208
- —, The Law of Nations (Rev.), 263
- —, trusts and mandates, 217
- Bristow v. Sequeville*, case of, 253
- British policy regarding navigation in European rivers, change in, 158
- Bryan plan of inquiry for settlement of disputes, 97, 98
- Bulgaria and her renunciation of Turkish control, 116
- Butler, Sir Geoffrey, obituary notice of, 206, 207
- —, and Macoby, Simon, The Development of International Law (Rev.), 264
- Cadenhead* case, the, 46
- Camouna*, case of the, 96 n.
- Canada and United States, correspondence between, regarding Chicago diversion, 152 et seq.
- Canadian Government and the Chicago diversion, 146 et seq.
- Cape Law Society v. Van Aardt*, case of, 69 n.
- Carolino*, case of, 12
- Cayuga Indians Claim* case (1926), 68 n.
- Channel tunnel, the, 219, 220
- Charkieh*, case of the, 69 n.
- Charlesworth Pilling & Co. v. the Secretary of State*, case of, 57

- Cheesebrough* (1879) case, 52 n.
Cherokee Nation v. State of Georgia, case of, 68 n.
 Chicago diversion, the (H. A. Smith), 144-57
 ———, ———, principles involved in, 154
 Chicago, growth and development of, 144, 145
 China, extraterritoriality in (Sir Skinner Turner), 56-64
 China's claim for abolition of extraterritorial jurisdiction, 61, 62
 ——— right to revise tariff and commercial articles of treaties, 135
 Chinese Nationalist Government, declaration of, 120
 ——— ——— ———, policy of, as regards treaties, 119, 120, 121
 ——— ——— ——— at Nanking, recognition of, by Powers, 56
 Chinese treaties, the revision clause in certain (George W. Keeton), 111-36
Chorzow Factory in Upper Silesia, Permanent Court of International Justice and, 43, 222, 231-3, 236-9
Cia Minera Ygnacio Rodriguez Ramos v. Bartlesville, case of, 69 n.
City of Denver v. Denver Water Co. (1918), case of, 39 n.
City of Omaha v. Omaha Water Co. (1910), case of, 39 n.
 Commission of conciliation, composition of, 101
 ——— ———, function of, 104
 Commission on control of Danube, European, 168
 Commission of Inquiry, in settlement of disputes, 96 et seq.
 ——— ——— and conciliation, permanent, 105, 106
 Conciliation, machinery of, 101 et seq.
 Conciliation Treaties, in settlement of disputes, 96 et seq.
 Confiscation of property in Soviet Russia, 45, 50
 Consular and diplomatic service formerly distinct, 2, 3
 ——— secretary at Embassy, status of, 2
 Consuls not entitled to diplomatic immunities, 5
 Conventions prepared at Geneva in 1928, General, 226-30
 Corbett, Percy Ellwood, and Smith, Herbert Arthur, Canada and World Politics (Rev.), 265
Costa Rica packet, case of, 183 n.
 Courts in China, "modern" and "magistrates", 62, 63
Crichton v. Samos Navigation Company and others, case of, 85 n.
Croft case, the, 183 n.
 Currency, paper, depreciation of, as a form of confiscation, 51
 Custom and evidence of custom, 81
 ———, rules of, basis of, 83, 84
Czecho-Slovakian Spirit Duty (Plebiscite) case, 69 n.
Czecho-Slovakian Language of Minorities case, 71 n.
Daimler Co., Ltd. v. Continental Tyre & Rubber Co. (1916), case of, 94
 Damages, calculation of, in international cases, 222-4
 Danish treaty of 1863 denounced by China, 134
 Danube, as a river of international concern, 166
 ———, British trade on the, 166, 167
 Danzig, jurisdiction of courts of, Permanent Court's advisory opinion regarding, 240, 241
 Deák, Francis, The Hungarian-Rumanian Land Dispute (Rev.), 267
 Decisions on borderline between municipal and international case law, 74
Delagoa Bay Railway Arbitration (1900), in relation to rights of alien property, 37
 de Murville, Henri Couve, Le Gouverneur dans les Dominions britanniques (Rev.), 277
 Denial of justice, definition of, 183, 184
 Diplomatic and consular service formerly distinct, 2, 3
 ——— ———, fusion of, 5
 Diplomatic immunities and municipal law, 72
 ——— ——— based on extraterritoriality, 13
 ——— ———, the claim to, scrutiny of, 5, 6
 ——— ———, modern developments (Sir Cecil J. B. Hurst), 1-13
 ——— ———, principle at root of recognition of, 6
 Disputes, place of commissions of inquiry and conciliation treaties in settlement of (Charles Cheney Hyde), 96-110
District Governor, Jerusalem-Jaffa District and Another v. Suleiman Murra and Another, case of, 69 n.
Dogger Bank Case, the, 96
 Drainage of Chicago, international problem raised by, 144, 145
Duff Development Co. v. Government of Kelantan (1924), case of, 245, 251, 252
 Eagleton, Clyde, The Responsibility of States in International Law (Rev.), 267

- Economic Statistics, international convention relating to, 228
- Ellerman Lines, Ltd. v. Reed and Others* (1928), 248, 257, 258
- Employers Liability, &c. v. Sedgwick Collins & Co.*, case of, 254
- Engelke v. Musmann*, case of, 1, 2, 5, 10, 11, 244-6, 250-2
- English Courts, digest of decisions of during 1927, 244-61
- Eustace v. Eustace*, case of, 247
- Evidence, rules of, in international proceedings, 220
- Expropriation and taxation contrasted, 54
- Extraterritorial Courts in China, British, 57, 58, 59, 60
- jurisdiction in China, machinery of, 57, 58, 59
- rights in China, conditions of renunciation of, by Powers, 118, 119
- Extraterritoriality, China's asserted right to such, 121 et seq.
- in China (Sir Skinner Turner), 56-64
- of foreign representatives, 4
- treaties, denunciation of, by China, 56 et seq., 117 et seq.
- , ultimate basis of, 57
- Fachiri, Alexander P., decisions, opinions, and awards of international tribunals in 1928, 231-43
- —, international law and the property of aliens, 32-55
- Fagernes* case, the, 245
- Finlay, George*, case of, 36
- Finlay of Nairn, Viscount, obituary notice of, 190-7
- First Russian Insurance Co. v. London & Lancashire Insurance Co.* (1928), case of, 246, 247, 253-5
- Foreign judgments, enforcement of, 224-6
- Fox*, case of the, 65
- French case bearing on privileges of foreign diplomatic representatives, 12
- French Convention of 1792 declaring the Scheldt open, 161
- French Conventions of 1886, 1887, and 1895 denounced by China, 133, 134
- Garner, J. W., International responsibility of states for judgments of courts and verdicts of juries amounting to denial of justice, 181-9
- Gaulois*, case of the, 96 n.
- Geneva and Pan-American draft treaties of arbitration and conciliation compared, 14, 15, 16
- —, optional clauses of, 15, 16
- German invasion of Belgium in 1914 in spite of treaty obligations, 117
- German Staatsgerichtshof, applications of international law by, 75, 94
- — and controversy between Württemberg and Baden over use of the Danube, 149, 150
- Gondra treaty, the, 21, 103 et seq.
- Gonsiorowski, Miroslav, *La Société des Nations et Problème de la Paix* (Rev.), 268
- Good will of a business, and tangible property in relation to compensation awards, 39
- Graham v. Graham*, case of, 257
- Gratuity of transit of mails, principle of, 174
- Greco-Turkish Agreement of Dec. 1, 1926, Permanent Court's advisory opinion regarding, 241-8
- Guilini v. The Reich* (1927), case of, 51 n.
- H. v. H.* (1928), case of, 247, 255, 256
- H.M. The Queen of Holland v. Drukker and others* (1928), case of, see *In re Visser*, case of
- Heathcote v. Chilton*, case of, 11
- Hides and skins, international agreement relating to, 228
- Higgins, A. Pearce, obituary notice of Dr. H. H. L. Bellot, 204
- —, obituary notice of Sir Geoffrey Butler, 206
- —, obituary notice of Sir John Paget Mellor, 201
- —, *The State of the City of the Vatican*, 214
- Higgins, Pearce, *Studies in International Law and Relations* (Rev.), 271
- Holy places in Palestine, difficulties concerning, 141, 142
- Hughes, Charles Evans, *The Supreme Court of the United States* (Rev.), 272
- Hurst, Sir Cecil J. B., *Diplomatic immunities—modern developments*, 1-13
- Hyde, Charles Cheney, *Place of Commissions of Inquiry and conciliation treaties in settlement of international disputes*, 96-110
- Hydro-electric power, loss of, caused by Chicago diversion, 147
- Illinois authorities and the canal between Lake Michigan and the Desplaines river, 145
- Immunities, diplomatic—modern developments (Sir Cecil J. B. Hurst), 1-13
- —, spheres of municipal and international law in regard to, 72, 73

- Import and export prohibitions and restrictions, conventions relating to abolition of, 227
- In re Achillopoulos*, case of, 249, 260
- In re Kooperman*, case of, 249, 260
- In re Schnapper*, case of, 247
- In re Visser*, case of, 246, 252, 253
- Ingenohl v. Wing On & Co. (Shanghai), Ltd.*, case of, 60, 61
- Inquiry, commission of, function of, 96
- Institute of International Law and responsibility of states for alien wrongs, 183
- International and municipal custom, 84
- law contrasted, 66, 76
- cases, calculation of damages in, 222-4
- custom, 81
- Disputes, Pacific Settlement of: general act, 226
- Joint Commission and questions of use of boundary waters, 147, 155
- concerning boundary waters between United States and Canada, 98, 101
- law administered by municipal courts, formal nature of, 75 et seq.
- and the Chicago diversion, 148
- and the doctrine of *rebus sic stantibus*, 115
- and "oppressive" treaties, 114
- and private property of aliens (Alexander P. Fachiri), 32-55
- and restrictions on doctrine of territorial sovereignty, 150
- , branches of, treated by municipal tribunals, 68 et seq.
- cases, Annual Digest of Public, 226
- customary, municipal court decisions as source of, 80 et seq.
- , decisions of municipal courts as a source of (H. Lauterpacht), 65-95
- , development of, decisions of national courts, an element of, 86 et seq.
- , new concepts in, exemplified in mandate for Palestine, 138, 139
- , particular, municipal decisions as a source of, 89 et seq.
- , rules of, contrasted with rules of municipal law, 76
- , scope for judicial interpretation of, 72, 73, 74
- , supremacy of, views on, 75, 76, 77 et seq.
- mails in time of war, 179
- Postal Bureau at Berne, 171 et seq.
- problem raised by diversion of Lake Michigan, 144 et seq.
- International proceedings, rules of evidence in, 220, 221
- responsibility of states for judgments and verdicts amounting to denial of justice (J. W. Garner), 181-9
- of states for wrongs suffered by aliens, 182, 183
- rivers, freedom of, British conversion to doctrine of, 164
- Tribunals, decisions, opinions, and awards of, in 1928, 231-43
- Intervention by Crown to preserve immunity of foreign diplomatic representative, 2, 11, 12
- Italian Insurance Monopoly*, case of, 39
- Italian treaty of 1866, denounced by China, 130, 131
- Jacobson v. Frachon*, case of, 225, 248, 249, 258, 259
- Janera*, case of the, 248, 258
- Japanese treaties of 1896 and 1903 denounced by China, 132, 133
- Jewish interests in Palestine, recognition of, 139, 140
- Jewish National Home, declaration about, 137, 138, 139
- Josef Inwald Actiengesellschaft v. Pfeiffer*, case of, 244 n.
- Judgments, foreign, enforcement of, 224-6
- Judiciary, independence of, in relation to injuries of aliens, 188
- Jupiter*, case of the, 94
- Juries, competence of, to decide cases involving offences against foreign diplomatic representatives, 186
- Jury, verdict of, international responsibility for, 185
- Kansas v. Colorado* (1902), case of, 151
- Keeton, George W., The revision clause in certain Chinese treaties, 111-36
- King, Rev. Jonas*, case of, 36
- Königin Regentes*, the, case of, 179 n.
- Labrador Boundary* case (1927), 74
- Lake of the Woods Treaty of 1925, 155
- Lauterpacht, H., decisions of the municipal courts as a source of international law, 65-95
- League of Nations and the Vatican State, 215
- , control of mandated territory by, 142, 143
- officials, privileges, and immunities of, 8, 9, 10
- , representatives and officials entitled to diplomatic immunities, 8, 9
- Lebanon Expropriation* case, 69 n.

Liquidation de la Société des Transports Internationaux v. Séquestre de la Société des Transports Internationaux, case of, 94 n.

Liquor traffic, suppression of, in virtue of "police power", 53

Lotus, case of the, 68 n., 70

Littaner Glove Corporation v. F. W. Milington, Ltd., case of, 250, 260, 261

Locarno Conventions, the settlement of disputes, 100, 101, 102

Lord Advocate v. Jaffrey (1921), case of, 247

Louisville and Nashville Railway Co. v. Mottley (1911), case of, 51

Lübeck and Mecklenburg-Schwerin, dispute between German Staatsgerichtshof and, 75

Luther, &c. v. Sagor, case of, 245

Macartney v. Garbutt, case of, 9, 245, 252

McIlvaine's Cox's Lessee case, 68 n.

Macoby, Simon, and Butler, Sir Geoffrey, The Development of International Law (Rev.), 264

Magdalena Steam Navigation Co. v. Martin, case of, 4 n.

Mandate for Palestine (Norman Bentwich), 137-43

— for Palestine, threefold purpose of, 138

— for Transjordan, 212, 213

Mandated territory, foreign relations of, 141

— —, rights of nationalities within, 138

Mandates Commission and Palestine, 142, 143

—, trusts and, 217-19

Marchand and Duchateau case, 69 n.

Maria, case of the, 65 n.

Masterson, W. E., Jurisdiction in the Marginal Seas, with Special Reference to Smuggling (Rev.), 274

Mellor, Sir John Paget, obituary notice of, 201-4

Metropolitan Water Board v. McCarthy (1874), case of, 39 n.

Michigan and Wisconsin boundary dispute, U.S. Supreme Court and, 74

Mighell v. Sultan of Johore, case of, 245

Minimum wage-fixing machinery, draft convention concerning, 230

Minority schools in Upper Silesia, Permanent Courts' judgment concerning, 233-5

Missouri v. Illinois (1906), case of, 151, 152

Money, paper, in relation to depreciated value, 51

Monroe doctrine in relation to Pan-American arbitration treaty, 17

Montreal, port of, effects of diversion of waters of Lake Michigan upon, 146, 147

Moresnet territory, decisions on status of, 69 n.

Municipal and international law contrasted, 66

— case law, attitude of authorities to, 75-80

Municipal Council of Sydney v. Bull, case of, 253

— courts, decisions of, as a source of international law (H. Lauterpacht), 65-95

—, —, as a source of particular international law, 89 et seq.

— —, as acts of the state itself, 84

—, —, enumeration of matters covered by, 68-71

—, —, law-creating effect of, 82 et seq.

—, —, part played by, in development of international law, 87

—, —, scope of, affecting international law, 67

—, matters outside the purview of, 72

—, the task of, 92 et seq.

Musmann v. Engelke, case of, 1, 2, 5, 10, 11, 244-6, 250-2

Nardini, murder of Count, Parisian jury's verdict on, 181

National tribunals, decisions of, involving points of international law, 244-61

Nationalities in Palestine, the two, 140

Niagara, rights of Canada in, 148, 149

Niboyet v. Niboyet, case of, 255

Niemeyer, Th., Handbuch der Abrüstungsprobleme (Rev.), 277

Nile, Anglo-Egyptian agreement regarding control of, 157

Noordam, the, case of, 179 n.

Norwegian Ships Arbitration (1921), 40

Notes, 208-30

Ogden v. Ogden, case of, 255

Oppenheim, L., International Law, vol. i, 4th ed. (Rev.), 273

"Oppressive" treaties, 113, 114

Pacific Settlement of International Disputes; General Act, 226

Pact of Paris, some implications of the, 208-10

Palestine, the mandate for (Norman Bentwich), 137-43

Palestinian citizenship, 140, 141

Pan-American and League of Nations Arbitration treaties, nature of disputes affected by, 18

- Pan American Treaty of Arbitration, constitution of tribunal under, 19
 ———, draft, 14, 15
 ———, reservations in, 17, 20
 ———, text of draft of, 22-31
- Peace Treaties of 1919 and rivers of international concern, 169
- Pemberton v. Hughes*, case of, 259
- Permanent Court of International Justice and the Chorzow Factory case, 43, 222, 231-3, 236-9
 ——— and Palestine, 142.
 ——— and the revision of treaties, 115
 ———, judgments and advisory opinions of, 231-43
 ———, China and Belgium's proposed appeal to, 123-6, 127, 128
 ——— on powers of European Commission of the Danube, 168 n.
 ———, United States and the, 210-12
- Phillipse, A. H., *Le Rôle du Conseil de la Société des Nations dans le Règlement pacifique des différends internationaux* (Rev.), 279
- Phillimore, Lord, obituary notice of, 197-201
- "Police power", American doctrine of, 51 et seq.
- Portuguese Religious Properties*, case of, 37
- Portuguese treaty of 1887 denounced by China, 131, 132
- Postal Congress, organization of a, 171
 ———, powers of delegates to, 172
 ———, procedure of, 173
 ———, votes for colonies at, 176
- Postal Congresses, International (Harry Raymond Turkel), 171-80
 ———, antagonisms shown at, 173
- Prize courts, independence of British, 65
 ———, national bias as affecting decisions of, 65
- Property, fundamental rights of, according to international precedents, 34 et seq.
- Property of aliens, international law and the (Alexander P. Fachiri), 32-55
- Prussian policy regarding the freedom of the Scheldt (1815), 164
- Pufendorf, *De officio hominis et civis juxta legem naturalem*, libri duo (Rev.), 280
- R. v. Jacobus Christian*, case of, 69 n.
- R. v. Moscovitch*, case of, 250, 261
- Reg. v. Keyn*, case of, 68 n.
- Raeburn v. Raeburn*, case of, 247, 257
- Ralli Bros. v. Compania Naviera Sota y Aznar*, case of, 253
- Rebus sic stantibus*, doctrine of, 111 et seq.
 ———, ———, in practice, 115-17

- Rebus sic stantibus*, doctrine of, in relation to Belgian and Chinese treaty difficulty, 126, 127, 128, 134, 136
 ———, ———, Swiss Federal Court and, 74, 75
- Recovery*, case of the, 65, 93 n.
- Reinman v. City of Little Rock* (1915), case of, 52
- Responsibility of states for damage to persons or property of aliens, 46 et seq.
- Reviews of Books:—
 Abrüstungsprobleme, Handbuch des (Th. Niemeyer), 277
 Académie de Droit International, *Recueil des Cours de l'*, 3 vols., 262
 Aerial Bombardment and the International Regulation of Warfare (M. W. Royse), 283
 Canada and World Politics (Percy Ellwood Corbett and Herbert Arthur Smith), 265
 Le Continent Américain et le Droit International (Francisco José Urrutia), 289
 Elsass-lothringische Staatsangehörigkeitsregelung und das Völkerrecht, Die (Walter Schätzel), 284
 Entraide Répressive Internationale et la Loi française du 10 mars, 1927, L' (Maurice Travers), 288
 European Law, The Development of (Munroe Smith), 287
 Gouverneur dans les Dominions britanniques, Le (Henri Couve de Murville), 277
 Grotius Society, Transactions of the, vol. xiii, 270
 Hungarian-Rumanian Land Dispute, The (Francis Deák), 267
 Immunités diplomatiques des représentants des états Membres et des agents de la Société des Nations, Les (Jacques Secretan), 286
 International Law (L. Oppenheim), vol. i, 4th ed., 273
 International Law and Relations, Studies in (Pearce Higgins), 271
 International Law, The Development of (Sir Geoffrey Butler and Simon Macoby), 264
 Jurisdiction in the Marginal Seas with Special Reference to Smuggling (William E. Masterson), 274
 Lausanner Vertrag und der griechisch-türkische Bevölkerungsaustausch, Der (G. Streit), 284
 Law of Nations, The (J. L. Brierly), 263

Reviews of Books—*continued*

- Necessity, Doctrine of, in International Law (Burleigh Cushing Rodick), 282
- Political Handbook of the World, Parliament, Parties, and Press (1929), 267
- Pufendorf: "De officio hominis et civis juxta legem naturalem, libri duo". *Classics of International Law*, 280
- Responsibility of States in International Law, The (Clyde Eagleton), 267
- Russland und Westeuropa (Michael Freiherr von Taube), 284
- Siam Treaties with Foreign Powers (1920-7), 284
- Smuggling, Jurisdiction in the Marginal Seas, with Special Reference to (William E. Masterson), 274
- Société des Nations dans le Réglement pacifique des différends internationaux, Le Rôle du Conseil de la (A. H. Philipse), 279
- Société des Nations et Problème de la Paix (Miroslas Gonsiorowski), 268
- Traités et des engagements internationaux concernant les Pays-Bas (1845-1900), Répertoire des (C. J. E. Bosmans et M. Visser), 263
- United States and Great Britain, Rivalry of the, over Latin-America (1808-30) (J. F. Rippey), 281
- United States, Supreme Court of the (Charles Evans Hughes), 272
- Ricket v. Metropolitan Railway* (1867), case of, 39 n.
- Rivers, British policy and the regulation of European (Ruth Bacon), 158-70
- Rodick, Burleigh Cushing, The Doctrine of Necessity in International Law (Rev.), 282
- Roselius & Company v. Karsten*, case of, 69 n.
- Royse, M. W., Aerial Bombardment and the International Regulation of Warfare (Rev.), 283
- Russian Commercial, &c., Bank v. Comptoir d'Escompte de Mulhouse*, case of, 254
- Saar Territory* (Prussian officials), case, 69 n.
- St. Lawrence, navigation of, controversy with America over, 147, 164 n.
- Salvesen's case*, 247
- Sanitary District of Chicago v. United States*, case of, 146 n.
- Santiago de Chile, Gondra treaty signed at, 21, 102
- Savage, Henry*, case of, 35
- Sawyer v. Commonwealth* (1902), case of, 39 n.
- Schätzel, Walter, Die Elsass-lothringische Staatsangehörigkeitsregelung und das Völkerrecht (Rev.), 284
- Scheldt as a river of international concern, 158
- , commercial importance of the, 160
- , friction with France over the, 161, 162, 163
- , strategical importance of the, 159
- Schibsby v. Westenholz*, case of, 250
- Secretan, Jacques, Les Immunités diplomatiques des états Membres et des agents de la Société des Nations (Rev.), 286
- Siam Treaties with Foreign Powers (Rev.), 284
- Sicilian Sulphur Monopoly*, case of, 34
- Silesia, rights of minorities in Upper, judgment of Permanent Court in case of, 233-5
- Sino-Belgian treaty of 1865, dispute as to revision of, 115 n., and see Belgian treaty with China
- Smith, H. A., The Chicago diversion, 144-57
- Smith, Herbert Arthur, and Corbett, Percy Ellwood, Canada and World Politics (Rev.), 265
- Smith, Munroe, The Development of European Law (Rev.), 287
- Sovereignty, doctrine of, in relation to rights over territorial waters, 152, 153, 154
- , rights of, in mandated territory, 141
- Spanish treaty of 1864 denounced by China, 128, 129
- Spanish-German Extradition Treaty*, case, 68 n.
- Spinoza on binding force of treaties, 111, 112
- Standard Oil Company*, case, 45
- State Succession* (Windhuk in South-West Africa) case, 93 n.
- Stathos v. Stathos*, case of, 247
- Stollmeyer v. Trinidad Lake Petroleum Co.* (1918), case of, 150
- Streit, G., Der Lausanner Vertrag und der griechisch-türkische Bevölkerungsaustausch (Rev.), 284
- "Study Commission" of Postal Congress, 172
- Tavignano*, case of the, 96 n.
- Taxation and expropriation contrasted, 54

- Tellini, General, murder of, Greek responsibility in regard to, 182
- Territorial waters, extent of sovereignty over, 152, 153, 154
- Thirty hogheads of sugar v. Boyle*, case of, 68 n.
- Transjordan, mandate for, 212, 213
- Travers, Maurice, L'Entr'aide Répressive Internationale et la Loi française du 10 mars, 1927 (Rev.), 288
- Treaties, binding force of, 111 et seq.
- of arbitration and conciliation, Pan-American and League of Nations (Sir John Fischer Williams), 14-31
- of conciliation, role of, 108
- regarding international commissions of inquiry, 98, 99
- , "unequal", 120
- Treaty of Berlin (1878), and the Austrian annexation of Bosnia and Herzegovina, 116
- of Paris (1856), Black Sea stipulations of, 113, 114
- of Trianon in relation to expropriation of Hungarian optants, 32
- obligations, reasons for unilateral renunciation of, 112, 113
- Triquet v. Bath*, case of, 68 n.
- Trusts and mandates, 217-19
- Tubantia*, case of the (1921), 96 n.
- Turkel, Harry Raymond, International Postal Congresses, 171-80
- Turkey, abolition of consular jurisdiction by (1911), 117
- Turkish régime in Palestine before war, 140
- Turner, Sir Skinner, Extraterritoriality in China, 56-64
- United States and the Permanent Court of International Justice, 210-12
- — bi-lateral conventions providing for commissions of inquiry, 97
- — federal system and international liabilities, 146
- — Supreme Court and riparian rights, 151, 156
- — v. *P. W. Smith*, case of, 69 n.
- — v. *Rio Grande Dam and Irrigation Co.* (1899), case of, 152 n., 157
- Urrutia, Francisco José, Le Continent Américain et le Droit International (Rev.), 289
- Vatican, State of the City of the, 214-17
- Village of Euclid v. Ambler Realty Co.* (1926), case of, 52, 53 n.
- Visser, M., et Bosmans, C. J. E., Répertoire des traités et des engagements internationaux concernant les Pays-Bas (Rev.), 263
- von Taube, Michael Freiherr, Russland und Westeuropa (Rev.), 284
- Vorovski, assassination of M., in Switzerland, and questions involved, 181
- West Rand Central Gold Mining Co., Ltd. v. Rex*, case of, 68 n.
- Wilkins v. Lagarde et Procureur de la République près le Tribunal de Papeete* (1926), case of, 94
- Williams, Sir John Fischer, The Pan-American and League of Nations treaties of arbitration and conciliation, 14-31
- Yuille, Shortridge Company*, case of, 183 n.

INDEX TO VOLUMES I-X

(For the purposes of this Index the volumes of the Year Book have been given serial numbers as follows:

Volume for	1920-21 =	Volume I.
" "	1921-22 =	" II.
" "	1922-23 =	" III.
" "	1923-24 =	" IV.
" "	1924 =	" V.
" "	1925 =	" VI.
" "	1926 =	" VII.
" "	1927 =	" VIII.
" "	1928 =	" IX.
" "	1929 =	" X.

The Roman figures in the index refer to the volumes, the Arabic figures to the pages.)

- Aaland Islands, question of, vi. 114
Abdul Majid Belshah, In re, case of, ix. 172, 185
Abo, case of the, iii. 191
 Abolition of Import and Export Prohibitions and Restrictions, Conventions relating to, x. 227
 Academy of International Law at The Hague, iv. 180; vi. 172-86
Acapulco, case of the, i. 89
Achaia, case of the, iii. 63 n.
Achillipoulos, In re, case of, x. 249, 260
 Acquisition and loss of nationality by marriage, U.S. legislation as to, iv. 169
Actaon, case of the, i. 155
Active, case of the, viii. 78 n.
Adams v. The People, case of, vi. 53 n.; viii. 124, 126
Adamson, P., Ex parte, case of, v. 34
 Administration, International (C. Delisle Burns), vii. 63-72
Admiralty Commissioners v. Page and others, case of, vi. 209 n.
 Admission of states to the League of Nations (L. M. Friedlander), ix. 84-100
Adriana, case of the, ii. 94
 Advisory opinion of the Permanent Court of International Justice, Council's request for an (A. D. McNair), vii. 1-13.
 — —, *see* Permanent Court
 Aerial law, Monaco Congress on, iii. 182
 Aerial Navigation Convention, 1919 (J. M. Spaight), v. 183
Affaire de la Maison Balguerie de Bordeaux contre le Gouvernement Espagnol, iv. 13
 Agreements, general international, ii. 211; iii. 213; iv. 250; v. 257; vi. 264; vii. 277; viii. 245; ix. 238
 Air bombardment (J. M. Spaight), iv. 21-33
 Air-force necessity, The doctrine of (J. M. Spaight), vi. 1-7
 Air law, The problems of (Professor J. E. G. de Montmorency), ii. 167-73
 Air Navigation Convention, 1919 (J. M. Spaight), v. 183
Aksionairnoyi Luther v. Sagor & Co., ii. 60 et seq., 203
 Alabama claims arbitration, vii. 113, 114, 117
 Albanian frontier question, Permanent Court of International Justice and the, vi. 197
Alfonso XIII, case of the, vii. 50 n.
 Alien enemy property, return of, by U.S.A. (Professor J. W. Garner), ix. 129, 130
 Aliens, property of, international law and the (Sir John Fischer Williams), ix. 1-30
Aline and Fanny, case of the, i. 22 n.
Alleganean, case of the, iii. 48; ix. 124
 Allowances, Claims for pensions and, under Treaty of Versailles, iv. 162
Alsop, case of, vii. 166, 174 et seq.; viii. 164, 173
Amalgamated Anthracite Collieries, case of, ix. 22 n.
Ambition, case of the, viii. 78.
 American International Law, Draft code of (Professor J. L. Brierly), vii. 14-23
 American-Mexican Mixed Claims Commission, decisions of, viii. 179; ix. 156
Amiral Ganteaume, sinking of the, viii. 135
Amiral Hamelin, case of the, i. 47, 52 n., 82, 83
Amorduct Manufacturing Co. v. Defries, case of, iv. 50
Anderson v. Anderson, case of, v. 27
Anderson v. Equitable Life Assurance Society of the United States, case of, viii. 189, 197, 198
 Angary (C. Ll. Bullock), iii. 99-129

- Anglo-American Pecuniary Claims Commission (Sir C. Hurst), ii. 193
 —, *Brown* case before, v. 210
 —, *Hardman* case before, ii. 198
 —, Hawaiian claims before, vii. 181
 —, *Zafiro* case before, vii. 206
 Anglo-German Mixed Arbitral Tribunal:
Tesdorff & Co. v. the German Government, iv. 179
 Anglo-Mexican, case of the, iv. 68, 69, 70, 73
Anhalt, case of the, vi. 134
Anna, case of the, ii. 67 n.
Annaberg, case of the, iv. 65, 66 n., 72
Annakumar Pillai v. Muthupayal, case of, iv. 41 n.; ix. 123
Anne, case of the, viii. 65 n.
Annesley, in re, case of, viii. 188, 195, 196
Annette, case of the, i. 280; ii. 59, 72
 Annual Digest of Public International Law cases, ix. 112; x. 226
Anthony v. American Glucose Co., case of, viii. 178
Antofagasta and Bolivia Railway Co., case of, viii. 183 n.
Antwerpen, case of the, iv. 54 n.
 Anzilotti, M., tribute to Lord Finlay by, x. 193
Appam, case of the, ii. 67 n.
 Arbitral awards, Hague Conventions and the nullity of, ix. 114-17
 Arbitration and Conciliation (A. P. Fachiri), ix. 128
 Arbitration between Great Britain and Costa Rica, arbitrator's opinion, vi. 199
 — Norway and the U.S.A., iv. 159-62; x. 40
 — Reparation Commission and Government of U.S.A. (Tankers case), viii. 156; ix. 10, 11; x. 45
 Arbitration clauses, protocol on, v. 196
 — and Conciliation, Pan-American and League of Nations Treaties of (Sir John Fischer Williams), x. 14-31
 Arbitration, juridical basis of (R. Y. Hedges), vii. 110-20
 Arbitrations, international, under the Treaty of St. Germain, iv. 124-30
Argo, case of the, iii. 71
 Arms Traffic Convention, vii. 192-5
Armytage v. Armytage, case of, viii. 195; x. 247, 255.
 Arnold, Dr. J. H., notes by, on early British prize cases, viii. 62, 63
Asia, case of the, viii. 70
Assurance Compagnie Excelsior v. Smith, case of, v. 226
Asturian, case of the, iii. 62 n.
Atalanta, case of the, iii. 191; ix. 31
Athanasios, case of the, vi. 129
Atkinson and Horsell's Contract, case of, vii. 38 n.
Atlas and Lighters, case of the, iii. 64 n.
Atto and Ganelon, case of the, ii. 181, 182, 190-2
Attorney General v. Brown, case of, v. 27 n.
Attorney General v. Chambers, case of, iv. 37 n.
Attorney General for Alberta v. Cook, case of, viii. 188, 194, 195; ix. 127, 182; x. 247
Attorney General for Canada v. Attorney General for British Columbia, case of, iii. 53; iv. 37
Attualita, case of the, ii. 73; iii. 165; vi. 130
Aubrey case before French and American Claims Commission (1884), vii. 171, 172
Aurora, case of the, viii. 79 n.
 Australia (Supreme Court, N.S.W.), decision of, involving a point of international law, vii. 224
 Australian opinion on Article 15, para. 8, of the Covenant of the League of Nations (A. H. Charteris), vii. 185.
Austrian Pensions (State Succession) case, x. 69 n.
Avis du Conseil d'État (Nov. 6, 1806), i. 48 et seq.
Axel Johnson, case of the, ii. 203
Barcelo, case of the, vii. 50 n.; ix. 34 n.
 Barcelona Conference on Communications and Transit, ii. 86, 87, 88, 89, 162, 174, 175.
 — and the Danube Statute (G. E. Toulmin), iii. 167-78
 Barcelona Conference on navigable waterways, ii. 86, 87, 88, 89, 162, 174, 175
 Barcelona Waterways Statute, iii. 168
Barclay v. Russell, case of, v. 84
Barnett's Trusts, case of, v. 82
Baron Stjernblad, case of the, i. 27 n.; vii. 48 n.
 Barratt, J. Arthur: Applicability of U.S. Prohibition Law to foreign ships entering American Ports, v. 184
Barrundia, General, case of, i. 59, 75, 89
Bartlett v. Bartlett, case of, viii. 193, 194
Batavier V, case of the, iii. 10
 Bate, John Pawley, Obituary notice of, ii. 207
 Baty, T.: Protectorates and Mandates, ii. 109-21
 Bacon, Ruth: British Policy and the Regulation of European Rivers of International Concern, x. 158-70
Baden, case of the, i. 153; vi. 103
 Baden, Dispute with Württemberg concerning use of upper waters of the Danube, x. 149

- Badere Zaffer*, case of the, vi. 107
Badische Co., in re, case of, iv. 51, 55
Baelz v. Public Trustee, case of, viii. 190, 201
Baker, Sir George Sherston, Obituary notice of, iv. 190
Baker, Professor P. J. N.: Codification of International Law, v. 38-65
—: The Doctrine of Legal Equality of States, iv. 1-20
—: The obligatory jurisdiction of the Permanent Court of International Justice, vi. 68-102
Bakeries, abolition of night work in, v. 203
Baltic Powers, notes defining position of, in 1854, viii. 3 et seq.
Baltica, case of the, ii. 201
Bank of the United States v. Deveau, case of, iv. 58
Banner Milling Co. v. State of New York, case of, x. 39 n.
Banque Belge v. Hambrouck, case of, ii. 63 n.
Banque Internationale de Commerce de Petrograd v. Goukassow, case of, v. 80, 226
Bays, territoriality of (Sir Cecil Hurst), iii. 42-54
Becker v. Phila. & Reading R. R., case of x. 39 n.
Beckett, W. E.: Criminal Jurisdiction over Foreigners: the *Franconia* and the *Lotus*, vii. 108-28
—: The Exercise of criminal jurisdiction over foreigners, vi. 44-60
—: Territorial Limits in the Bristol Channel, the *Fagernes* case, ix. 120
—: What is Private International Law?, vii. 73-96
Bed of the Sea?, Whose is the (Sir Cecil Hurst), iv. 34-43
Behn, Meyer & Co. v. Miller, case of, ix. 130 n.
Behring Sea Seal Fisheries Arbitration (1893), vii. 115; and see *Fur Seal Fisheries Arbitration*
Belgenland, case of the, i. 71 n.
Belgia, case of the, iii. 64 n.
Belgian claim to the treasure of the Order of the Golden Fleece, iv. 126-9
Belgian Prize Court decisions, ii. 180-92
Belle Poule, case of the, vi. 109
Bellot, H. H. L., obituary notice of, x. 204
—: Territorial Limits in the Bristol Channel, the *Fagernes* case, ix. 121
Bentwich, Norman: The Legal Administration of Palestine under the British military occupation, i. 139-48
—: The Mandate for Palestine, x. 137-43
—: Mandated Territories: Palestine and Mesopotamia (Iraq), ii. 48-56
Bentwich, Norman: Nationality in mandated territories detached from Turkey, vii. 97-109
—: The Soviet Government and Russian property in foreign countries, v. 78-88
Bentzon v. Boyle, case of, iv. 74
Berchtold, In re, case of, iv. 186
Berizzi Brothers Co. v. the Steamship Pesaro, case of, viii. 202; and see *Pesaro*
Berkeley, Reginald: The Work of the League of Nations, ii. 150-73
Berlin, case of the, iii. 63 n.
Bermuda, case of the, vii. 51 n.
Bernisse and Elve, case of the, i. 279; ii. 202; vii. 47 n.
Bertha Elizabeth, case of the, vii. 49 n.
Bethell, In re, case of, ix. 172.
Bibliography, i. 243; ii. 240; iii. 230; iv. 209; v. 238; vi. 241; vii. 253; viii. 222; ix. 214; x. 291.
Bingham's case, viii. 116
Birkenfels, case of the, iii. 65 n.
Birmingham, case of the, viii. 75 n.
Bisschop, W. R.: Immunity of States in Maritime Law, iii. 159-66
—: International Interpretation of National Case Law, iv. 131-6
—: Sovereignty, ii. 122-32
Blockade, Continuous Voyage and, viii. 70-3
— in modern conditions (H. W. Malkin), iii. 87-98
Blonde, case of the, ii. 202; iii. 55, 67, 68, 194, 195; viii. 203; ix. 37
Blundell v. Catterall, case of, iv. 38 n.
Boedes Lust, case of the, iii. 55 n.
Bohemian Union Bank v. Administrator of Austrian Property, case of, ix. 167, 175
Bombardment, Air (J. M. Spaight), iv. 21-33
Bones, International Agreement relating to, x. 228
Bonilla, Dr., case of, i. 90
Borel, Professor E., Freedom of Navigation on the Rhine, ii. 75-89
Bradbury v. English Sewing Cotton Co., case of, viii. 201
Bradford Corporation v. Pickles, case of, x. 154
Bradlaugh v. de Rin, case of, ix. 186
Braeg, Richard, case of, vi. 49 n.
Brazil, The Neutrality of, i. 125-37
"Break" in a voyage, what constitutes, viii. 75-9
Brierly, Professor J. L.: Draft Code of American International Law, vii. 14-23
—: Do we need an International Criminal Court?, viii. 81-8

- Brierly, Professor J. L.: Matters of Domestic Jurisdiction, vi. 8-19
 —: Shortcomings of International Law, v. 4-16
 —: Some implications of the Pact of Paris, x. 208
 —: Theory of implied State Complicity in international claims, ix. 42-9
 —: Trusts and Mandates, x. 217
Brinckman v. Mailey, case of, iv. 38 n.
 Bristol Channel, extent of jurisdiction of English courts in, viii. 190
 —, territorial limits in the, ix. 120-6
Britannia, case of the, iv. 88, 89
 British-American Pecuniary Claims Commission, ii. 198-200; v. 210; vii. 116, 164, 165, 205
 British Empire, Negotiation and conclusion of treaties affecting, v. 193
 British note to U.S.A. regarding their rights as belligerents in 1854, viii. 18
 British Policy and the Regulation of European Rivers of International Concern (Ruth Bacon), x. 158-70
 British Prize Courts and the War (Sir H. Erle Richards), i. 11-34
 British self-governing Dominions, International status of (M. M. Lewis), iii. 21-41
 British treaties, When do they involve legislation? (A. D. McNair), ix. 59-68
Broadmayne, case of the, ii. 70, 71, 72; vi. 133 n.
Brock v. Poor, case of, viii. 176
Brown, Mamie, case of, ix. 162
Brown, Robert E., case of, v. 163, 210
Buena Ventura, case of the, iii. 71 n., 75
 Bullock, C. Ll., Angary, iii. 99-129.
Bulmer v. Norris, case of, viii. 162
Bundesrath, case of the, v. 70 n.
Burgermeister, case of the, i. 58 n., 76
 Burns, C. Delisle: International Administration, vii. 54-72
Burthe v. Denis, case of, vii. 180
Bury v. Pope, case of, ii. 168 n.
 Butler, Sir Geoffrey, Obituary notice of, x. 206
 —: Sovereignty and the League of Nations i. 35-44

 Cables, submarine, and International Law (Professor A. Pearce Higgins), ii. 27-36; iv. 42
 Cabotage, continuous voyage and, viii. 73, 74
Cadenhead case, vii. 118; ix. 11; x. 46
Cairncross v. Lorimer, case of, v. 34 n.
 Calculation of damages in international cases, x. 222

Calderwood case, vii. 170, 171
Caldwell v. Van Vlissingen, case of, i. 66
Calvin's case, viii. 123.
 Calvo clause in contracts, viii. 181
Camouna case, x. 96
Campos, case of the, vi. 138
 Canadian-American Halibut Fisheries Treaty, iv. 168; vi. 33, 34, 191
 Canadian-Belgian commercial treaty, vi. 192
Canadienne, case of the, vii. 117
Canevaro case, ix. 5
Cap Trafalgar, case of the, i. 129
Cape Law Society v. Van Aardt, case of, x. 69 n.
 Capitulations, disappearance of, in Turkey, v. 192
 Capture at sea in war, Value of right of (Vice-Admiral Sir H. Richmond), ix. 50-8
 Carelia, Eastern, advisory opinion of Permanent Court of International Justice on status of, v. 206; vii. 7
Carl Walter, case of the, viii. 76, 77
Carlo Poma, case of the, vi. 130
Caroline, case of the, iii. 188; vii. 129
Carolino's case, x. 12
 Carriage of belligerent troops by a neutral transport, the *Greta* case (Professor A. Pearce Higgins), iii. 188
 Carriage of sick and wounded soldiers by hospital ships, ii. 177
Casablanca arbitration, vii. 115, 116
Casdagli v. Casdagli, case of, iv. 73 n.; vii. 132, 133
 Case Law, International interpretation of national (W. R. Bisschop), iv. 131-6
 Cases dealing with international law decided by the English courts, i. 277; ii. 201; iii. 194; iv. 185; v. 226; vii. 211; viii. 187; ix. 167; x. 244
Casseres v. Bell, case of, iv. 56 n.
Catherine Louisa, case of the, viii. 73 n.
 Cayenne and Surinam frontier dispute arbitration, vii. 112.
Cayuga Indians claim, x. 68 n.
Central Trust Co. v. Kneeland, case of, viii. 178
Ceres, case of the, viii. 63 n., 64 n.
Cervignano, case of the, viii. 140
Chamberlain & Hookham Ltd. v. Solar Zählerwerke G.m.b.H., case of, iii. 186
 Channel Tunnel, The (Professor H. A. Smith), x. 219
Charkieh, case of the, ii. 64, 66 n., 73; iii. 160; vi. 141; x. 69 n.
Charlesworth Pilling v. Secretary of State, case of, x. 57.
Charlotte, case of the, viii. 75 n.
Charlotte Sophia, case of the, viii. 73

- Charteris, A. H.: An Australian opinion on Article 15, paragraph 8, of the Covenant, vii. 185
- : The legal position of merchantmen in foreign ports and national waters, i. 45-96
- : The Mandate over Nauru Island, iv. 137-52
- Chattin, B. L.*, case of, ix. 157, 158; x. 183 n.
- Cheesebrough*, case of, x. 52 n.
- Cherokee Nation v. State of Georgia*, case of, x. 68 n.
- Chesterfield*, case of the, viii. 69 n., 80 n.
- Chesterman's Trusts, in re*, case of, viii. 198
- Chicago Diversion, The (Professor H. A. Smith), x. 144-57
- Child Welfare Congress, Second international, iii. 183-5
- Children, Traffic in Women and, International Conference on, ii. 175
- Chile*, case of the, iii. 62; viii. 203; ix. 64 n.
- Chile and Peru, arbitration between, vii. 114
- China*, case of the, v. 71
- China*, the *Trent* and the (H. W. Malkin), v. 66
- China, Extraterritoriality in, and the question of its abolition (M. T. Z. Tyau), ii. 133-49
- China, Extraterritoriality in (Sir S. Turner), x. 56-64
- Chinese Treaties, Revision Clause in certain (Professor G. W. Keeton), x. 111-36
- Chirac v. Chirac*, case of, ii. 46 n.
- Chisholm v. the State of Georgia*, case of, i. 39 n.
- Chopin* case, vii. 170
- Chorzow Factory, Claim for Indemnity (Merits), Judgment of Permanent Court of International Justice concerning, x. 236
- Chorzow Factory and rural estates in Polish Upper Silesia, advisory opinion of Permanent Court as to, viii. 149
- , Judgment of Permanent Court as to (Interpretation of Judgments 7 and 8), x. 231
- , expropriation of, ix. 6 et seq., 135; x. 43, 222
- Christina*, case of the, viii. 74 n.
- City of Denver v. Denver Water Co.*, case of, x. 39 n.
- City of Omaha v. Omaha Water Co.*, case of, x. 39 n.
- "Civilian population", Smuts's definition of, iv. 166, 167
- Cía Minera Ygnacio Rodriguez Ramos v. Bartlesville*, case of, x. 69 n.
- Claims for pensions and allowances under Treaty of Versailles, iv. 162-6
- Claims, international, *see* International claims
- Claims, international, Theory of implied state complicity in (Professor J. L. Brierly), ix. 42-9
- , Nationality of (Sir Cecil J. B. Hurst), vii. 163-82
- Clan Grant*, case of the, iv. 70
- Clapham Steamship Co. v. Vulcaan Co. of Rotterdam*, case of, iv. 51
- Clark, G. N.: Neutral Commerce in the War of the Spanish Succession and the Treaty of Utrecht, ix. 69-83
- Cleary v. Booth*, case of, ii. 136 n.
- Cleminson, H. M.: Laws of Maritime Jurisdiction in time of Peace with special reference to territorial waters, vi. 144-53
- Clunet, Maître, obituary notice of, iv. 187
- Cobbett, Dr. Pitt, obituary notice of, i. 235
- Code of American International Law, Draft (Professor J. L. Brierly), vii. 14-23
- Codification of International Law (Professor P. J. N. Baker), v. 38-55
- , progress of in 1927, ix. 113
- Collisions and Assistance and Salvage at Sea, Conventions relating to (Brussels, 1910), vii. 152.
- Combes'* case, facts of, viii. 116, 117
- Comité Maritime International, discussion on Immunity of state-owned ships (Oct. 1922), iv. 131
- Comm. v. Macloon et al.*, case of, vi. 47 n., 53 n.; viii. 117 n., 126, 128
- Commerce, Immunities of state-owned ships employed in (Professor J. W. Garner), vi. 128
- , neutral, *see* Neutral commerce
- Commissioner of Stamps v. Hope*, case of, vii. 225
- Commissioners of Inland Revenue v. Sansom*, case of, iv. 52, 53
- Commissions of Inquiry and Conciliation Treaties, The Place of, in the Peaceful Settlement of International Disputes (C. C. Hyde), x. 96-110
- Committee of Jurists, Resolutions of, An International Criminal Court and the (Lord Phillimore), iii. 79-86
- Communications, Barcelona Conference on Transit and, ii. 174; iii. 167-78
- Compania Mercantil Argentine v. United States Shipping Board*, case of, v. 226; vi. 134, 141; vii. 212, 218
- Companies, incorporated, Nationality of, under the Treaty of Versailles, iii. 186

- Company for Mechanical Woodworking A. M. Luther v. James Sagor & Co.*, case of, ii. 60, 62 n., 203; v. 78
- Complicity, Theory of implied state, in international claims (Professor J. L. Briery), ix. 42-9
- Compulsory Jurisdiction, The Permanent Court of International Justice and (Dr. B. C. J. Loder), ii. 6-26
- Concadoro*, case of the, iii. 65 n.
- Conception Bay case, *see Direct United States Cable Co. v. Anglo-American Telegraph Co.*
- Concession, effect of clause in, excluding resort to diplomatic remedies, viii. 181, 182
- Conciliation, Arbitration and (A. P. Fachiri), ix. 128
- , Pan-American and League of Nations Treaties of Arbitration and (Sir John Fischer Williams), x. 14-31
- Conciliation Treaties, The place of Commissions of Inquiry and, in the Peaceful Settlement of International Disputes (C. C. Hyde), x. 96-110
- Conference conventions on the laws of war, list of, i. 120, 121
- Conquest, legal results of, vii. 41
- , right of, vii. 25
- Consent of States and the Sources of the Law of Nations (P. E. Corbett), vi. 20-30
- Constitution*, case of the, ii. 67 n.
- Consul, special protection of, ix. 160, 161
- Consul Corfizon*, case of the, i. 28 n.; ii. 94, 95
- Continental Tyre and Rubber Co. v. Daimler*, case of, iv. 44, 48, and *see under Daimler*
- Continho Caro & Co. v. Vermont*, case of, iv. 55 n.
- Continuous Voyage, Doctrine of (O. H. Mootham), viii. 62-80
- Contraband (Sir Erle Richards), iii. 1-16
- Conventions, general, concluded under the auspices of the League of Nations, ii. 174; v. 195; vii. 189; x. 226
- Corbett, P. E.: The Consent of States and the Sources of the Law of Nations, vi. 20-30
- , What is the League of Nations?, v. 119-48
- Corfu dispute between Italy and Greece, v. 49; vii. 5, 9
- Cornelis*, case of the sloop, viii. 12
- Corporations, the national character and status of (A. D. McNair), iv. 44-59
- Corrie, Jennie L.*, case of, ix. 156, 157
- Corvaia* case, vii. 166-8
- Costa Rica*, case of the, i. 78, 89, 90
- Costa Rica and Great Britain*, arbitration between, vi. 199
- and the Republic of Central America, arbitration between, vii. 112
- Costa Rica Packet* arbitration, vi. 52 n., 59, 60; x. 183 n.
- Court of International Justice, *see Permanent Court of International Justice*
- Covenant of the League of Nations, An Australian opinion on Art. 15, para. 8, of the, vii. 185-9
- —, Special committee of lawyers on interpretation of, v. 179
- Creole*, case of the, i. 58, 86; ix. 60
- Crichton, V. M. S.: The pre-war theory of neutrality, ix. 101-11
- Crichton v. Samos Navigation Co. and others*, case of, x. 85 n.
- Crimdon*, case of the, ii. 71, 72; iii. 159; vi. 133 n.
- Criminal Court, International, *see International Criminal Court*
- Criminal jurisdiction, *see Jurisdiction, criminal*
- Criminal jurisdiction over foreigners, the *Franconia* and the *Lotus* (W. E. Beckett), viii. 108-28
- Croft* case, x. 183 n.
- Crowdy, Dame Rachel: International Conference on Traffic in Women and Children held at Geneva in June, 1921, ii. 175
- Cunard Steamship Co. v. Mellon*, case of, v. 184, 187
- Cunningham, in re, Healing v. Webb*, case of, vii. 214, 223
- Cunningham's case (R. v. Cunningham)*, i. 62, 64; iii. 44, 47, 48; viii. 191; ix. 167, 175
- Curlew*, case of the, iii. 116 n.
- Customs formalities, convention relating to simplification of, v. 197
- Customs officials, responsibility for negligence of, ix. 157
- Cutting* case, vi. 44, 46 et seq., 53 n.
- Cyprus, annexation of, 1914, ii. 118 n.
- Cyprus Convention, ii. 118 n.
- Czar Nicolai II*, case of the, iii. 64 n.
- Czechoslovakian claim to pictures at Vienna, iv. 126-7
- Czechoslovakian Language of Minorities* case, x. 71 n.
- Czechoslovakian Spirit Duty (Plebiscite)* case, x. 69 n.
- Daimler v. Continental Tyre Co.*, case of, i. 172; iii. 186; iv. 47-9, 53, 55, 58, 75; viii. 163; x. 94
- Damages, The calculation of, in international cases, x. 222

- Daniel* claim, vii. 174
- Danube, history of control of, x. 166
- Danube, Jurisdiction of European Commission, advisory opinion of the Permanent Court of International Justice, as to, ix. 149
- Danube Navigation Treaty (London, 1883), vii. 143-5
- Danube Statute, the Barcelona Conference on Communications and Transit and the (G. E. Toulmin), iii. 167-78
- Danzig, administration of, by League of Nations, ii. 155; v. 138-41
- , The Free City of (Malcolm M. Lewis), v. 89-102
- , Jurisdiction of Courts of, advisory opinion of Permanent Court concerning, x. 240
- , Polish Postal service in, advisory opinion of Permanent Court of International Justice regarding, vii. 201
- Dawes Plan, decisions of interpretation tribunal under, viii. 186
- Daylight*, case of the, ix. 163, 164
- De facto* Government and state succession, ix. 190, 191
- De Superioritate Maris Angliae*, the Roll of (T. C. Wade), ii. 99-108
- Death duties, double, discussion on, at Institute of International Law, iv. 182, 183
- Debts, payment of, by or to enemy subjects, i. 169, 171, 177-80
- , mixed arbitral tribunal for, i. 182, 185
- Decisions of Municipal Courts as a source of International Law (H. Lauterpacht), x. 65-95
- Decisions of national tribunals involving points of international law, i. 277; ii. 180, 201; iii. 189; iv. 185; v. 226; vi. 211; vii. 211; viii. 187; ix. 167; x. 244
- Declaration of Paris, Inner history of the (H. W. Malkin), viii. 1-44
- Delagoa Bay Railway* arbitration, vi. 165 et seq.; vii. 111; viii. 164, 168, 173; ix. 2, 3; x. 37
- Denationalization (Sir John Fischer Williams), viii. 45-61
- Denial of justice, cases alleging, ix. 158, 159, 160, 162
- , International Responsibility of States for Judgments of Courts and Verdicts of Juries amounting to (Professor J. W. Garner), x. 181-9
- Derfflinger*, case of the, iii. 66 n.; iv. 64 n.
- Detention, Visit, search and (Professor A. Pearce Higgins), vii. 43-53
- Deutsche Amerikanische Petroleum Gesellschaft v. The Standard Oil Company of California*, case of, viii. 156 et seq.
- Deutsches Kohlen Depot Gesellschaft*, case of, iii. 64 n., 70
- Diana*, case of the, iv. 68, 69
- Digest, Annual, of public international law cases, ix. 112; x. 226
- Diplomatic Immunities, Modern Developments (Sir Cecil Hurst), x. 1-13
- Diplomatic service, Changes in organization of, i. 97-104
- Direct United States Cable Co. v. Anglo-American Telegraph Co.*, case of, i. 62; iii. 44, 47, 48; viii. 191; ix. 121, 122 n.; 123
- Dirigo*, case of the, i. 277; ii. 201
- Dirigo, Hallingdal and other ships*, case of the, ix. 64 n.
- Doctrine of Continuous Voyage (P. H. Mootham), 62-80
- Doctrine of Legal Equality of States: (Professor P. J. N. Baker), iv. 1-20
- Dogger Bank* case, x. 96
- Domestic jurisdiction, *see* Jurisdiction, domestic
- Domicile as a test of enemy character: (M. M. Lewis), iv. 60-77
- , cases on, viii. 188, 194, 195
- , law of the, in relation to divorce or nullity, ix. 126, 127, 169 et seq., 181 et seq.
- Dominions, Treaty-making power of the (M. M. Lewis), vi. 31-43
- Dora*, case of the, ii. 59, 72
- Doris*, case of the, viii. 76
- Dover Castle*, sinking of the hospital ship, ii. 77; iii. 156
- Drago's use of the doctrine of legal equality of states, iv. 1, 2, 156
- Drugs, potent, Agreement respecting the unification of pharmacopoeial formulas for (Brussels, 1906), vii. 150, 151
- Duclair* incident of 1870, iii. 112, 118, 122, 123, 124
- Duff Development Co. Ltd., v. Government of Kelantan and others*, case of, iv. 186; vii. 212, 213, 218, 219; x. 245
- Dumas on the right of capture at sea, ix. 50 et seq.
- Dunham v. Lamphore*, case of, iii. 48
- Dusseldorf*, case of the, i. 279; ii. 67 n., 201
- Dutch mining case, vi. 113
- Dutch ports, Belgian Prize Court decisions as to German ships interned in, ii. 180
- Dux*, case of the, vii. 49 n.

- Eagle*, case of the, viii. 75, 76, 78
Eaglewood, case of the, vi. 138.
 Eastern Carelia, advisory opinion of Permanent Court of International Justice regarding status of, v. 206
Eastern Extension Telegraph Company case, arbitration, vii. 118, 119
Ebenezer, case of the, viii. 74, 80
 Economic Statistics, International Convention relating to, x. 228
Eden Hall, case of the, iii. 62
Edna, case of the, i. 278; ii. 93, 201; vii. 47
 Edward Fry Memorial Library of International Law, ii. 179; iii. 188
Eemland, case of the, viii. 141 n.
 Effect of War on Treaties, The (Sir Cecil J. B. Hurst), ii. 37-47
Egerton v. Brownlow, case of, iv. 55 n.
 Egypt: Cairo Court of First Instance on *Finck v. Minister of the Interior*, vi. 219
Eisner v. Macomber, case of, viii. 162, 167
Eiusdem generis rule, application of in international law, v. 181
Ekkbatana-West Hinder case, ix. 143
Elbing, Hanau and Tasmania, case of the, ii. 181, 182, 183-90
Elders and Fyffes Ltd. v. Hamburg Amerikanische Packetfahrt A. G., case of, iv. 52
 Electric power, transmission in transit of, convention relating to, v. 201
Eliza, case of the, viii. 67 n., 78
Ellerman Lines Ltd. v. Reed, case of, x. 248, 257
Elve, case of the, vii. 47 n.
Elwine Kreplin, case of the, i. 70 n.
Emanuel, case of the, ix. 54
Embricos v. Anglo-Austrian Bank, case of, ii. 63 n.; ix. 186, 187
Emden, the, and her captures, i. 152
 Emigration, conventions relating to Chinese, i. 100, 201 n.
 Employer, competence of International Labour Organization to regulate work of, viii. 154-6
Employers' Liability Assurance Corporation Ltd. v. Sedgwick, Collins & Co., Ltd., case of, viii. 189, 199, 200; ix. 179, 180, 190
 Enemy character, Domicile as a test of (M. M. Lewis), iv. 60-77
 Enemy persons, Removal of from neutral vessels, the *Trent* and the *China* (H. W. Malkin), v. 66-77
 Enemy property, Return of, by United States (Professor J. W. Garner), ix. 129
 Enemy ships in port at outbreak of war (Professor A. Pearce Higgins), iii. 55-78
 Enforcement of Foreign Judgments, The, x. 224
Engelke v. Musmann, case of, x. 1 et seq., 244, 250
Englewood, case of the, vi. 138
 English courts, decisions of, in cases dealing with international law, i. 277; ii. 201; iii. 194; iv. 185; v. 226; vii. 211; viii. 187; ix. 167; x. 244
 English law as to status of corporations summarized, iv. 56
Enoch, case of the, viii. 79 n.
Eolo, case of the, ii. 72
 Epidemic Commission of League of Nations, its work in Poland, ii. 161
 Equality of States, Doctrine of legal (Professor P. J. N. Baker), iv. 1-20
Erissos, case of the, ii. 71, 72; vi. 133 n.
Ernst Woermann, case of the, i. 58 n., 75, 76
Ertel Bieber & Co., v. Rio Tinto Co., Ltd., case of, i. 183
Erymanthos, case of the, iii. 64 n.
Esposende, case of the, ii. 70; iii. 159
Essex, case of the, iv. 79, 80; viii. 79 n.
Estate of White Todd, case of, viii. 189, 198
Eumaeus, case of the, iv. 73
 Eupen, the League and the allocation of, ii. 155
 European Commission of the Danube, jurisdiction of, advisory opinion of Permanent Court of International Justice concerning, ix. 149-56
Eustace v. Eustace, case of, vii. 213, 222; x. 247
 Evans, I. L.: The Protection of Minorities, iv. 95-123
 Evans, Sir Samuel, on *Broadmayne* case, quoted, ii. 71
 Evidence, Rules of, in international proceedings, x. 220
 Excess of Jurisdiction, Legal remedy in case of (H. Lauterpacht), ix. 117-20
Exchange v. McFaddon, case of, i. 63; viii. 202
 Exchange of Greek and Turkish populations, advisory opinion of Permanent Court of International Justice concerning, vi. 190
 Expatriation, the right of, viii. 52
 Expropriation and compensation, International law as to, ix. 28 et seq.
 Expropriation and International Law (A. P. Fachiri), vi. 159-71
 Extritoriality, law and treaties in relation to privileges of, ix. 60
 — in China and the question of its abolition (M. T. Z. Tyau), ii. 133-49
 — of an allied belligerent army, *Joysticks Patent* case, vii. 227 et seq.

Extradition, law and treaties on, ix. 60
 Extraterritoriality (P. W. Thorneley), vii.
 121-34
 — in China (Sir S. Turner), x. 56-64
 Fachiri, A. P.: Arbitration and Concilia-
 tion, ix. 128
 —: Expropriation and International Law,
 vi. 159-71
 —: International Law and the Property
 of Aliens, x. 32-55
Fagernes, case of the, viii. 187, 190, 191;
 ix. 120-6, 167, 174, 175; x. 245
Falk, case of the, ii. 202; vii. 47
Fame, case of the, viii. 78 n.
Fanny, the *Aline* and the, case of, i. 22 n.
Faulkner case, viii. 184
Federico, case of the, vii. 50 n.
 Feetham, R.: Second International Child
 Welfare Congress, iii. 183-5
Felicity, case of the, i. 155
Fenix, case of the, iii. 64 n., 70, 77 n.
Fenton Textile Association v. Krassin,
 case of, iii. 195; ix. 61
Ferdinand, ex-Czar of Bulgaria, in re, case
 of, vii. 214
Fiji Land Claims arbitration, vii. 117
Finck v. Minister of the Interior (Egypt),
 case of, vi. 219
Finlay, George, case of, x. 36
Finlay of Nairn, Viscount, Obituary
 notice of, x. 190
Finzi v. Minister of the Treasury, case of,
 v. 174
*First Russian Insurance Co. v. London and
 Lancashire Insurance Co.*, case of
 x. 246, 253
Five Steam Lighters, case of, iii. 60
F. J. Lisman, case of the, vii. 48
F. Koechlin et Cie v. Kestenbaum Bros.,
 case of, ix. 173, 185
*F. Lederer, executors of, v. the German
 Government*, case of, vii. 177 et seq.
Flamenco, case of the, iv. 64, 66 n., 67 n.
Florence H., case of the, vi. 135
Flynn v. Brooklyn City R. R. Co., case of,
 viii. 176
Folliott v. Ogden, case of, v. 79
Ford et al. v. United States, case of, viii. 112,
 126
 Foreign and Diplomatic Service, Changes
 in the Organization of the, i. 105-8.
 Foreign Judgments, The enforcement of,
 x. 224
 Foreigners, criminal jurisdiction over
 (W. E. Beckett), viii. 108-28
 —, —, exercise of (W. E. Beckett), vi.
 44-60
Foreman v. Free Fishers of Whitstable, case
 of, iii. 53 n.; iv. 37 n.
Fornage, Raymond, case of, vi. 49 n.

Forsattning, case of the, i. 52 n.
Fortuna, case of the, iv. 55 n.; ix. 38 n.
Foucher case before French and American
 Claims Commission, vii. 173
Fox, case of the, viii. 133 n.; x. 65
 France and Great Britain, dispute be-
 tween, as to nationality decrees in
 Tunis and Morocco, iv. 175-8
 France: Civil Tribunal of the Seine, deci-
 sion of, in case as to "Joystick"
 patents, vii. 227-32
France (Dreyfus Bros. and others) v. Peru,
 case of, ix. 5
Francis, case of the, viii. 12
Franconia case, i. 64, 65; viii. 108 et seq.;
 ix. 121, 132, 143; and see also
R. v. Keyn
Frederico, case of the, iii. 189
 Free City of Danzig, The (M. M. Lewis),
 v. 89-102
Free Fishers of Whitstable v. Gann, case of,
 iv. 37 n.
 Freedom of Navigation on the Rhine
 (Professor E. Borel), ii. 75-89
Freeport, case of the, viii. 78
French Company of Venezuelan Railways,
 case of, viii. 183 n.
Freundschaft, case of the, viii. 77 n.
*Fried v. Administrator of German Pro-
 perty and the Controller of the
 Clearing House*, case of, vii. 211,
 215, 216
Fried Krupp, re, case of, v. 80
Frieda Mahn, case of the, iii. 64 n.
 Friedlander, Lilian M.: The Admission of
 States to the League of Nations,
 ix. 84-100
Friendship, case of the, iii. 188
Fritz-Schultz Co. v. Raimés Co. (U.S.A.),
 case of, iv. 58, 75
 Fry Library of International Law, ii. 179;
 iii. 188
Fur Seal Arbitration, v. 35; vii. 115
Futch-ty, case of the, iii. 62 n.
Gaasterland, case of the, viii. 141 n.
Gagara, case of the, i. 280; ii. 58, 59, 66 n.
*Gagnière, A., & Co. v. Eastern Co. of
 Warehouses, &c., Ltd.*, case of, ii. 63
Galvan, Salomé Lerma de, case of, ix. 159
Gann v. Free Fishers of Whitstable, case of,
 iii. 53 n.
Garcia v. Garcia, case of, viii. 185
Garcia v. U.S.A., case of, ix. 11 n.
 Garner, Professor J. W.: Acquisition and
 loss of Nationality by marriage,
 iv. 169
 —: An arbitration case between Norway
 and the U.S.A., iv. 159
 —: Immunities of state-owned ships em-
 ployed in commerce, vi. 128-43

- Garner, Professor J. W.: International Responsibility of States for Judgments of Courts and Verdicts of Juries amounting to Denial of Justice, x. 181-9
- : Return of alien enemy property by the U.S.A., ix. 129
- Gas Warfare, Washington Conference on, iii. 180
- Gaskoin, C. J. B.: Prize Case notes in the days of Stowell, iv. 78-89
- Gaulois* case, x. 96
- General Act for the Pacific Settlement of International Disputes, 1928, x. 226
- Genesee, Kankakee, Hocking*, case of the, iv. 51
- George Washington*, case of the, viii. 77 n.
- Georgia*, case of the, vi. 109 n.
- Gerasimo*, case of the, iv. 70, 74; vii. 25 n.
- German-American Mixed Claims Commission, decisions of, v. 222; vi. 204
- , work of, ix. 164
- German interests in Polish Upper Silesia, Judgment of the Permanent Court of International Justice concerning viii. 147-53
- German settlers in Poland, Advisory opinion of Permanent Court of International Justice concerning, v. 207
- German ships interned in Dutch ports, Belgian Prize Court decisions as to, ii. 180
- Germania*, case of the, iii. 58 n., 64 n., 74 n.
- Germans domiciled in South-West Africa, Naturalization of, vi. 188
- Germany and Poland, litigation between, as to expropriations in Polish Upper Silesia, ix. 6 et seq., 135 et seq.
- Giulini v. the Reich*, case of, ix. 12, 22 n.; x. 51
- Glenridge*, case of the, vi. 138
- Gneisenau*, case of the, in Antwerp, ii. 180, 185, 188
- Golaa*, case of the, viii. 189, 198
- Golubchick*, case of the, i. 69 n.
- Gomez, José Dolores, political refugee, opinion of Mr. Bayard concerning, i. 87, 88
- Goudy, Henry, obituary notice of, ii. 209
- Gramophone & Typewriter Co., Ltd. v. Stanley*, case of, iv. 46 n., 47, 53; viii. 162, 167
- Grayson* case before French & American Claims Commission (1880), vii. 169, 170
- Great Britain and Costa Rica, arbitration between, vi. 199
- Greco-Turkish Agreement of December 1, 1926, advisory opinion of Permanent Court concerning, x. 241
- Greece and Bulgaria, dispute between, Permanent Court of International Justice and, vi. 195, 197; vii. 138, 139
- Greek and Turkish populations, exchange of, advisory opinion of Permanent Court of International Justice concerning, vi. 198
- Greta*, case of the, iii. 188 et seq.
- Grimbald proceedings, in relation to sovereignty of the seas, ii. 100, 104
- Guatemala v. Nunez*, case of, viii. 188, 196, 197
- Gulflight*, case of the, i. 162
- Gutenfels*, case of the, iii. 62, 63, 65 n., 70; iv. 74
- H. v. H.*, case of, x. 247, 255
- Haabet*, case of the, i. 22 n.
- Hagerup, Georges Francis, obituary notice of, ii. 207
- Hague Academy of International Law, The (Professor A. Pearce Higgins), iv. 180
- (E. N. van Kleffens), vi. 172-86
- Hague Conventions and the nullity of arbitral awards, ix. 114-17
- Hahn v. Public Trustee*, case of, vii. 212, 217
- Hakan*, case of the, i. 277; ii. 201; ix. 64 n.
- Haley*, case of, ix. 158
- Halibut Fisheries Treaty between Canada and the U.S.A., iv. 168; vi. 191
- Halley* decisions under Treaty of Washington, 1871, vii. 166, 173
- Hallingdal, Dirigo and other ships*, case of the, ix. 64 n.
- Hamborn*, case of the, i. 278; iv. 51
- Hamburg Prize Court, condemnation of the *Appam* by, ii. 183
- Hardman* claim before Anglo-American Pecuniary Claims Commission, ii. 197; vii. 118
- Harmony*, case of the, iv. 69
- Harris v. Owners of the Franconia*, case of, ix. 121
- Hastings v. Hastings*, case of, viii. 195
- Hawaii, liability of Government of, for foreign claims, v. 173
- Hawaiian claims before the Anglo-American Pecuniary Claims Commission, vii. 181
- Healing v. Webb; In re Cunningham*, case of, vii. 223
- Heathfield v. Chilton*, case of, x. 11
- Hedges, R. Y.: The juridical basis of arbitration, vii. 110-20

Helena, case of the, ii. 64; v. 79
Henrietta, case of the, viii. 74 n.
Hercules, case of the, iii. 55, 67, 68; ix. 37
Hides and Skins, International Agreement relating to, x. 228
Higgins, Professor A. Pearce: The Academy of International Law at The Hague, iv. 180
—: Belgian Prize Court Decisions regarding German ships interned in Dutch ports, ii. 180
—: The carriage of belligerent troops by a neutral transport: the *Greta* case, iii. 188
—: The carriage of sick and wounded soldiers by hospital ships, ii. 177
—: Enemy ships in port at the outbreak of war, iii. 55-78
—: "L'Institut de Droit International," iii. 185; iv. 180
—: The Law of Peace, iv. 153-8
—: The Monaco Congress on Aerial Law, iii. 182
—: The Monroe Doctrine, v. 103-18
—: A new school of International Law, ii. 178
—: Retaliation in Naval Warfare, viii. 129-46
—: Ships of War as Prize, vi. 103-10
—: The State of the City of the Vatican, x. 214
—: Submarine Cables and International Law, ii. 27-36
—: Submarine Warfare, i. 149-65
—: Treatment of Mails in time of War, ix. 31-41
—: Visit, search and detention, vii. 43-53
Hilckes, *In re*, *ex parte Muhesa Rubber Plantations*, case of, i. 172; iv. 49, 51
Hillerod, case of the, i. 26
Hocking, *Kankakee* and *Genesee*, case of the, iv. 51
Holland, Sir Erskine, K.C., obituary notice of, vii. 184
Holstein, case of the, vi. 110
Home Missionary Society (Sierra Leone) arbitration, vii. 118
Honduras, case of the, i. 87, 88
Hoogskarpel, case of the, iv. 84 n.
Hoop, case of the, i. 183; viii. 74 n.
Hope, case of the, iii. 191; viii. 79 n.
Hopkins, George W., case of, viii. 180
Hospital ships, carriage of sick and wounded soldiers by (Professor A. Pearce Higgins), ii. 177
Hungary and Roumania, dispute between, as to expropriation of rural land-owners in Transylvania, ix. 1
Hungerford, case of the, vi. 138 n.

Hurst, Sir Cecil J. B.: The British-American Pecuniary Claims Commission, ii. 193
—: Diplomatic Immunities, Modern Developments, x. 1-13
—: The Effect of war on Treaties, ii. 37-47
—: Interpretation of Article 15, paragraph 8, of the Covenant of the League of Nations: Matters solely within the jurisdiction of a state, iv. 175
—: Nationality of Claims, vii. 163-82
—: State succession in matters of tort, v. 163-78
—: The territoriality of bays, ii. 42-54
—: Transit and Communications Conference at Barcelona, ii. 174
—: Wanted! An International Court of Piepowder, vi. 61-7
—, Whose is the Bed of the Sea?, iv. 34-43
Hyde, Charles C.: The Place of Commissions of Inquiry and Conciliation Treaties in the peaceful settlement of international disputes, x. 96-110
Hyde v. Hyde, case of, ix. 172
Hydraulic Power, Convention on development of, affecting more than one state, v. 202
Hypatia, case of the, iv. 65
Ice King, case of the, vi. 133, 142
Imina, case of the, viii. 68
Immanuel, case of the, viii. 64 n.
Immunities of state-owned ships employed in commerce (Professor J. W. Garner), vi. 128-43; viii. 202
Immunity, rules as to, in English courts, ii. 74
Immunity of Public ships, Judicial recognition of States and Governments and the (A. D. McNair), ii. 57-74
Immunity of state-owned ships, Comité Maritime International and, iv. 131
Immunity of states in maritime law (W. R. Bisschop), iii. 159-66
Imperial Conference, 1923, and the negotiation of treaties affecting the British Empire, v. 193
Imperial Japanese Government v. Peninsular & Orient S. N. Co., case of, ii. 137; vii. 132, 133
Import and Export Prohibitions and Restrictions, Conventions relating to abolition of, x. 227
In Time, case of the, iii. 114
Indian Chief, case of the, iv. 53
Indian Prince, case of the, iv. 67
Industria, case of the, ix. 38 n.
Industrial Property, rights of, affected by World War, Agreement relating to, Berne, 1920, vii. 155

- Ingenohl v. Wing On & Co.*, case of, x. 60
Ingraben, case of the, iii. 61
 Inner History of the Declaration of Paris (H. W. Malkin), viii. 1-44
 Institut de Droit international, 1921 meeting of, iii. 185
 —, 1922 meeting of, iv. 181
 —, Resolutions of, as to jurisdiction over territorial waters, i. 63, 92-6
 —, on submarine cables, ii. 30
 Insurance against accidents to workmen, conventions as to, i. 205, 207
 International Administration (C. delisle Burns), vii. 54-72
 International agreements, general, iii. 213; iv. 250; v. 257; vi. 264; vii. 277; viii. 245; ix. 238
 —, list of, i. 237; ii. 211
 International arbitrations under the Treaty of St. Germain, iv. 124-30
 International cases, The calculation of damages in, x. 222
 International claims, Theory of state complicity in (Professor J. L. Brierly), ix. 42-9
 International Court of Piepowder, Wanted! (Sir Cecil J. B. Hurst), vi. 61-7
 International Criminal Court and the Resolutions of the Committee of Jurists (Lord Phillimore), iii. 79-86
 International Criminal Court?, Do we need an (Professor J. L. Brierly), viii. 81-8
 International Disputes, General Act for the Pacific Settlement of, 1928, x. 226
 International Disputes, The Place of Commissions of Inquiry and Conciliation Treaties in the Peaceful Settlement of (C. C. Hyde), x. 96-110
 International Health Organization of the League of Nations, ii. 163.
 International Interpretation of National Case Law (W. R. Bisschop), iv. 131-6
 International Justice, Permanent Court of, *see* Permanent Court of International Justice
 International Labour Conventions (Sir John Macdonell), i. 191-221
 International Labour Organization, question as to competence of, before the Permanent Court of International Justice, iv. 174
 —, competence of, to regulate work of employer, advisory opinion of Permanent Court of International Justice concerning, viii. 154
 —, its constitution, ii. 153, 154
 —, work of, v. 203
 International Law, Hague Academy of, *see* under Hague
 —, Annual Digest of cases, ix. 111; x. 226
 International Law, The Codification of (Professor P. J. N. Baker), v. 38-65
 —, —, progress of in 1927, ix. 113
 —, Decisions of Municipal Courts as a source of (H. Lauterpacht), x. 65-95
 —, Decisions of National Tribunals involving points of, *see* under Decisions
 —, Draft Code of American (Professor J. L. Brierly), vii. 14-23
 —, Edward Fry Memorial Library of, ii. 179; iii. 183
 —, Expropriation and (A. P. Fachiri), vi. 159-71
 —, Grounds of Intervention in (P. H. Winfield), v. 149-62
 —, New school of, in Paris, ii. 178
 — and the Property of Aliens (Sir J. Fischer Williams), ix. 1-30
 — — (A. P. Fachiri), x. 32-55
 —, recent decisions of U.S. Supreme Court involving questions of, viii. 202
 —, The shortcomings of (Professor J. L. Brierly), v. 4-16
 —, Spinoza and (H. Lauterpacht), viii. 89-107
 —?, What is Private (W. E. Beckett), vii. 73-96
 International Postal Congresses (H. R. Turkel), x. 171-80
 International proceedings, Rules of evidence in, x. 220
 International Responsibility of States for Judgments of Courts and Verdicts of Juries amounting to Denial of Justice (Professor J. W. Garner), x. 181-9
 International Status of the British self-governing Dominions (M. M. Lewis), iii. 21-41
 International Tribunals, decisions, opinions, and awards of, v. 204; vi. 193; vii. 197; viii. 147; ix. 135; x. 231
 Interpretation of National Case Law, iv. 131-6
 Interpretation Tribunal under the Dawes plan, decisions of, viii. 186.
 Intervention, grounds of, in international law (P. H. Winfield), v. 149-62
 —, History of, in international law (P. H. Winfield), iii. 130-49
 —, right of, of the League of Nations, v. 136
 Iraq, *see* Mesopotamia
Irish Free State v. Guaranty Safe Deposit et al., case of, ix. 190
Italian Life Insurance Monopoly expropriation case, vi. 166; ix. 2, 3; x. 39

- Jacobson v. Frachon*, case of, x. 225, 248, 258
- Jacobus Christian v. Rex*, case of, v. 227; vi. 211 et seq; x. 69 n.
- Jally*, case of, i. 53, 59, 61
- Janera*, case of the, x. 248, 258
- Janes, Byron Everett*, case of, ix. 43 et seq.
- Jansen v. Driefontein Consolidated Mines*, case of, i. 184; iv. 45, 46, 47, 49, 52
- Jassy*, case of the, ii. 69; vi. 129 n.
- Jecker v. Montgomery*, case of, viii. 65 n.
- Jerusalem-Jaffa District Governor v. Suleiman Murra*, case of, viii. 187, 192, 193; x. 69 n.
- Jesus*, case of the, viii. 65, 66, 68, 80
- Johanna Emilia*, case of the, iii. 191
- John*, case of the, viii. 76 n.
- Johnson, in re*, case of, iv. 147 n.; viii. 195
- Johnson v. Cooke*, case of, ix. 170
- Jones, Laura B. et al.*, case of, viii. 184
- Jonge Klassina*, case of the, iv. 53, 65, 72
- Jonge Pieter*, case of the, viii. 69, 72, 80 n.
- Jonge Thomas*, case of the, viii. 65 n.
- Joseph Inwald Actiengesellschaft v. Pfeiffer*, case of, ix. 168, 176
- Joystick patents*, case of the, vii. 227-32
- Judgments and advisory opinions of the Permanent Court of International Justice, iv. 172; v. 204; vi. 193; vii. 197; viii. 147; ix. 135
- Judicial Recognition of States and Governments and the Immunity of Public Ships (A. D. McNair), ii. 57-74
- Jungfer Charlotta*, case of the, viii. 76
- Juno*, case of the, viii. 69
- Jupiter*, case of the, vii. 213, 219; viii. 60 n.; ix. 168, 176; x. 94
- Juridical Basis of Arbitration, The (R. Y. Hedges), vii. 110-20
- Jurisdiction, criminal, Exercise of, over foreigners (W. E. Beckett), vi. 44-60
- , —, over foreigners; The *Franconia* and the *Lotus* (W. E. Beckett), viii. 108-28
- , compulsory, The Permanent Court of International Justice and (Dr. B. C. J. Loder), ii. 6-26
- , of the Courts of Danzig, Advisory opinion of the Permanent Court concerning, x. 240
- , domestic, Matters of (Professor J. L. Brierly), vi. 8-19
- , Laws of Maritime, in time of Peace, with special reference to Territorial Waters (H. M. Cleminson), vi. 144-58
- Legal remedy in case of excess of (H. Lauterpacht), ix. 117
- of the Permanent Court of International Justice (Sir H. Erle Richards), ii. 1-5
- Jurisdiction, obligatory, of the Permanent Court of International Justice (Professor P. J. N. Baker), vi. 68-102
- of a state, matters solely within the, Permanent Court of International Justice on (Sir Cecil J. B. Hurst), iv. 175
- Jurists, Advisory Committee of (The Hague, 1920), and an International Criminal Court (Lord Phillimore), iii. 79-86
- Jussy*, case of the, vi. 129 n.
- Justice, Permanent Court of International, see Permanent Court.
- Justus Scharf Ltd. v. Hagen*, case of, vii. 224 et seq.
- Kaiserrie*, case of the, vi. 104
- Kankakee, The Hocking and the Genesee*, case of the, iv. 51
- Kansas v. Colorado*, case of, x. 151
- Kara Deniz*, case of the, iv. 185
- Keeton, G. W.: The Revision Clause in certain Chinese Treaties, x. 111-36
- Kennedy, G. A.*, case of, ix. 45, 46, 158
- Kiel Canal, right of passage through, vi. 115
- Kim*, case of the, i. 21 n., 277; iii. 11 n.; viii. 71 n.
- King, Rev. Jonas, dispute with Greek Government over expropriation, vi. 164; ix. 2, 3; x. 36
- King of the Two Sicilies v. Wilcox*, case of, ix. 191
- Kleffens, E. N. van: The Hague Academy of International Law, vi. 172-86
- Klingenstein v. Maier*, case of, vii. 176, 177
- Kodak Ltd. v. Clark*, case of, iv. 46 n.
- Konigin*, case of the, iii. 60
- Koningen Regentes*, case of the, ix. 35 n.
- Kooperman, In re*, case of, x. 249, 260
- Koursk*, case of the, ii. 71
- Kronprinsessan Margareta*, case of the, ii. 202
- Kronprinzessin Cecilie*, case of the, iii. 58 n., 63 n.
- L'Alerte*, case of the, vi. 109 n.
- La Bellone*, case of the, vi. 109 n.
- L'Étoile*, case of the, vi. 109 n.
- La Hoche*, case of the, vi. 109
- La Virginie*, case of the, iv. 66
- Labour Conventions, International (Sir John Macdonell), i. 191-222
- Labrador Boundary* case, x. 74
- Lacy's case*, viii. 115, 116, 117 n., 118
- Lake Monroe*, case of the, vi. 135
- Lammasch, Heinrich, obituary notice of, i. 223

- Lauterpacht, H.: Decisions of Municipal Courts as a source of International Law, x. 65-95
- : Legal Remedy in case of excess of jurisdiction, ix. 117-20
- : Spinoza and International Law, viii. 89-107
- Law of Nations, Consent of States and sources of the (P. E. Corbett), v. 20-30
- Law of Peace, The (Professor A. Pearce Higgins), iv. 153-8
- Lawrence, Dr. T. J., obituary notice of, i. 231
- Laws of Maritime Jurisdiction in time of peace (H. M. Cleminson), vi. 144-58
- Laws of Oleron, ii. 102
- Laws of War, The League of Nations and the, i. 109-24
- Le Hardy v. La Voltigeante*, case of, iv. 60
- Le Mesurier v. Le Mesurier*, case of, ix. 126, 127
- League of Nations, Admission of states to the (Lilian M. Friedlander), ix. 84-100
- , Covenant of, An Australian opinion on Article 15, para. 8 (A. H. Charteris), vii. 185
- , Covenant of, Interpretation of Article 15, para. 8 (Sir Cecil J. B. Hurst), iv. 175
- , Covenant of, Special Committee of Lawyers on questions relating to the interpretation of, v. 179
- , and Danzig, v. 90
- , The Position of Switzerland in the (R. B. Mowat), iv. 90-4
- , Secretariat of, vii. 61 et seq.
- , Sovereignty and the (Sir Geoffrey Butler), i. 35-44
- , Sovereignty, Seisin and the (Sir J. Fischer Williams), vii. 24-42
- , What is the (P. E. Corbett), v. 119-48
- , The Work of the (Reginald Berkeley), ii. 150-66
- Lebanon Expropriation* case, x. 69 n.
- Lecouterier v. Rey*, case of, v. 82
- Lederer, F., v. the German Government*, case of, viii. 177
- Lee v. Abdy*, case of, viii. 197; ix. 184
- Legal Administration of Palestine under the British Military Occupation (N. Bentwich), i. 139-48
- Legal Equality of States, The Doctrine of (Professor P. J. N. Baker), iv. 1-20
- Legal Position of Merchantmen in foreign ports and national waters (A. H. Charteris), i. 45-96
- Legal Remedy in case of excess of jurisdiction (H. Lauterpacht), ix. 117-20
- Legality of the Occupation of the Ruhr (A. D. McNair), v. 17-37
- Legation, Right of, of League of Nations, v. 122
- Leon XIII*, case of the, i. 69 n.
- Leonora*, case of the, i. 29 n.; iii. 73; iv. 74 n.; viii. 135, 138, 142
- Leucade*, case of the, i. 11 n., 152
- Lewis, M. M.: The Canadian-American Halibut Fisheries Treaty, iv. 168
- : Domicile as a Test of Enemy Character, iv. 60-77
- : The Free City of Danzig, v. 89-102
- : The International Status of the British self-governing Dominions, iii. 21-41
- : The Treaty-making power of the Dominions, vi. 31-43
- Liebmann, ex parte*, case of, i. 174; viii. 57 n.
- Lily*, case of the, iii. 60 n.
- Lindo v. Rodney*, case of, iii. 55 n., 67
- Liquidation de la Société des Transports Internationaux v. Séquestre de la Société des Transports Internationaux*, case of, x. 94 n.
- Liquor treaty between the British Empire and the U.S.A., v. 187
- Lisa*, case of the, v. 226
- Lisette*, case of the, viii. 73 n.
- Literary and artistic property as affected by the peace treaty, i. 186-8
- Littauer Glove Corporation v. F. W. Millington, Ltd.*, case of x. 250, 260
- Little Cornelia*, case of the, viii. 79 n.
- Littlejohn & Co., v. the United States*, case of, viii. 203
- Lizardi*, case of, vii. 171
- Loder, Dr. B. C. J.: The Permanent Court of International Justice and Compulsory Jurisdiction, ii. 6-26
- Lökken*, case of the, ix. 124
- Lomonosoff*, case of the, ii. 64
- London & South American Investment Trust v. British Tobacco Co. (Australia)*, ix. 169, 180, 191
- Lord Advocate v. Clyde Navigation Trustees*, case of, iv. 37 n.
- Lord Advocate v. Jaffrey*, case of, viii. 195; ix. 127; x. 247
- Lord Advocate v. Wemyss*, case of, iv. 37 n., 38
- Lord Fitzhardinge v. Purcell*, case of, iv. 37 n., 38
- Lotus*, case of the, viii. 108 et seq; ix. 19, 131-4, 139-44; x. 68 n., 70, 80
- Louisiana v. Mississippi*, case of, v. 185 n.
- Louisville & Nashville Railroad Co. v. Mottley*, case of, ix. 24; x. 51
- Low v. Bowverie*, case of, v. 34 n.
- Ludvig v. Woollen Co.*, case of, viii. 178

- Luigi*, case of the, vi. 129 n.
Luna, case of the, ii. 202
Lusitania compensation awards, v. 222;
vi. 204 et seq.
Lutzw, case of the, iii. 66 n.; iv. 70, 71,
73
Luxardo v. Public Trustee, case of, vii. 211,
216
Lynch v. Turrish, case of, viii. 175
- Macartney v. Garbutt*, case of, ix. 61 n.;
x. 9
Macaura v. Northern Assurance Co., Ltd.,
case of, viii. 162, 167
McCorkindale's executors v. Bok, case of,
v. 214
Macdonell, Sir John: International Labour
Conventions, i. 191-222
—, obituary notice of, ii. 204
McIlwaine v. Cox's Lessee, case of, x. 68 n.
Mackenzie, Norman: Two recent Canadian
Treaties, vi. 191
Mackenzie v. Hare, case of, iv. 170 n.
*McLeod v. Attorney General for New South
Wales*, case of, iii. 22
McNair, A. D.: The Council's request for
an advisory opinion from the Per-
manent Court of International
Justice, vii. 1-13
—: Application of the *Eiusdem generis*
rule in international law, v. 181
—: Judicial Recognition of States and
Governments, and the Immunity of
Public Ships, ii. 57-74
—: Legality of the Occupation of the
Ruhr, v. 17-37
—: The National Character and Status of
Corporations, iv. 44-59
—: So-called State Servitudes, vi. 111-27
—: When do British Treaties involve
Legislation?, ix. 59-68
Magdalena Bay incident, the, v. 107
Magdalena Steam Navigation Co. v. Martin
case of, x. 4 n.
Maghnild (s.s.) v. McIntyre Bros. & Co.,
case of, v. 26, 27
Magnet, case of the, iii. 116 n.
Mail Ships Act, 1891, i. 66 et seq.
Mails, treatment of, in time of war (Pro-
fessor A. Pearce Higgins), ix. 31-41
Maipo, case of the, ii. 73; vi. 131, 132, 133,
140 n.
*Maison Balguerie de Bordeaux c. le
Gouvernement Espagnol*, case of,
iv. 13
Malkin, H. W.: Blockade in modern con-
ditions, iii. 87-98
—: The Inner History of the Declaration
of Paris, viii. 1-44
—: Reservations to multilateral conven-
tions, vii. 141-62
- Malkin, H. W.*: The *Trent* and the *China*,
v. 66-77
—: The Washington Conference, iii. 179
Mallén, Francisco, case of, ix. 160, 161
Manchester v. Massachusetts, case of, iii.
48; ix. 124
Mandate for Transjordan, The, x. 212
Mandate for Palestine, The (N. Bentwich),
x. 137-43
Mandate over Nauru Island, The (A. H.
Charteris), iv. 137-52
*Mandated Territories: Palestine and Meso-
potamia (Iraq)*, (N. Bentwich), ii.
48-56
— detached from Turkey, Nationality in,
(N. Bentwich), vii. 97-109
Mandates, Protectorates and (T. Baty),
ii. 109-21
Mannheim, case of the, viii. 189
Manningtry, case of the, iv. 68 n., 69
Marchand and Duchateau case, x. 69 n.
Maria, case of the, i. 155; ii. 93; iii. 9;
iv. 5 n., 84 n.; vii. 43 n., 49 n.;
viii. 78, 79 n.; x. 65
Maria Monses, case of the, viii. 73
Maria Teresa, case of the, viii. 67
Marie Glaeser, case of the, iii. 64 n.; ix.
64 n.
Marie Leonhardt, case of the, ii. 202; iii.
56 n., 66, 68
Marie Luz, case of the, i. 85
Maritime Jurisdiction in time of peace,
Laws of, with special reference to
territorial waters (H. M. Cleminson),
vi. 144-58
Maritime Law, Immunity of States in
(W. R. Bisschop), iii. 159-66
Maritime ports, International régime of,
convention and statute on, v. 200
Marriage, acquisition and loss of nation-
ality by, new legislation in U.S.A.
respecting (Professor J. W. Garner),
iv. 169
Marshall v. Grinbaum, case of, ii. 63 n.;
v. 83
Martha van Comminga, case of the, viii. 74
Martin, in re, case of, viii. 196
*Massiana claim before Franco-Venezuelan
Commission*, vii. 174
Massey, Gertrude Parker, case of, ix. 45,
162
Matamoras cases, iii. 95
Matilda, case of the, vi. 109 n.
Mavrommatis Palestine Concessions, Per-
manent Court of International
Justice and the, vi. 193, 196; vii.
137; ix. 144-9
Maxan, case of, vii. 171
Maxwell v. Grunhut, case of, iv. 54 n.
Mellor, Sir John, obituary notice of, x.
201

- Merchantmen, The legal position of, in foreign ports and national waters (A. H. Charteris), i. 45-96
 —, belligerent, Rules governing departure of from Brazilian Ports, i. 127
Mercury, case of the, viii. 78
 Mesopotamia (Iraq), Palestine and, as Mandated Territories (N. Bentwich), ii. 48-56
Messicano, case of the, ii. 71, 72; vi. 133 n.
Metro. Water Board v. McCarthy, case of, x. 39 n.
 Mexican-American Mixed Claims Commission, decisions of, viii. 179-86; ix. 156 et seq.
Mighell v. Sultan of Johore, case of, ii. 65, 66 n., 67 n.; vi. 134; x. 245
Milford, case of the, i. 69 n.
Miller v. Race, case of, ii. 63 n.
Minerva, case of the, vi. 109 n.; viii. 65 n., 75 n.
 Minimum Wage Fixing Machinery, Draft Convention concerning the creation of, x. 230
Ministries of the Interior and of Finance v. Commune of Capri, case of, v. 175
 Minorities, The Protection of (I. L. Evans), iv. 95-123
 —, Rights of, in Upper Silesia (Minority Schools), Judgment of the Permanent Court of International Justice concerning, x. 233
Miramichi, case of the, ix. 64 n.
Missouri v. Illinois, case of, x. 151
 Mixed Arbitral Tribunal, The Anglo-German (C. M. Picciotto), iv. 179
Moeve, case of the, i. 152
 Monaco Congress on Aerial Law (Professor A. Pearce Higgins), iii. 182
 Monastery of St. Naoum dispute, Permanent Court of International Justice and the, vi. 197
 Monroe Doctrine, The (Professor A. Pearce Higgins), v. 103-18
Montana, case of the, vii. 214
 Montmorency, J. E. G. de: Problems of Air Law, ii. 167-73
 Mootham, O. H.: The Doctrine of Continuous Voyage, 1756-1815, viii. 62-80
Moray Firth case, ix. 123
Mortensen v. Peters, case of, ix. 66 n., 123 n.
 Mosul Boundary question, vii. 24
 —, advisory opinion of the Permanent Court of International Justice on, vii. 139, 203 et seq.
Moulis v. Owen, case of, ix. 187
Mowat, R. B.: The Position of Switzerland in the League of Nations, iv. 90-4
Mowat v. McFee, case of, iii. 47
Möwe, case of the, i. 14 n.; iii. 63 n., 64 n.
 Multilateral Conventions, Reservations to (H. W. Malkin), vii. 141-62
 Municipal Courts, Decisions of, as a source of International Law (H. Lauterpacht), x. 65-95
Musmann v. Engelke, case of, ix. 61 n.
N. V. Kwik Hoo Tong Handel Maatschappij v. James Finlay & Co., case of, ix. 173, 189
 Napoleonic wars, British reprisals at sea during, viii. 132, 139
 Narcotic drugs, convention for control of, vii. 190
 National Case Law, International Interpretation of (W. R. Bisschop), iv. 131-6
 National character and status of corporations (A. D. McNair), iv. 44-59
 "National treatment" of his property, Alien's right to, ix. 13
 National tribunals, decisions of, involving points of International Law, i. 277; ii. 201; iii. 194; iv. 185; v. 226; vi. 211; vii. 211; viii. 187; ix. 167; x. 244
 Nationality, A question of, ii. 200
 —, acquisition and loss of, by marriage, new law in U.S.A. regarding (Professor J. W. Garner), iv. 169-72
 —, as a ground for intervention, v. 160
 — Decrees in Tunis and Morocco (French Zone), Decision of Permanent Court of International Justice in regard to, iv. 175
 — in mandated territories detached from Turkey (N. Bentwich), vii. 97-109
 — of Claims (Sir Cecil J. B. Hurst), vii. 163-82
 — of Incorporated Companies under the Treaty of Versailles, iii. 186
 —, Polish, advisory opinion of Permanent Court of International Justice concerning acquisition of, v. 208
 Naturalization of Germans domiciled in South-West Africa, vi. 188
 Nauru Island Agreement Act (1920), iv. 140
 —, The Mandate over (A. H. Charteris), iv. 137-52
Nautik, case of the, ii. 72 n.
 Naval Prize Act (1864), ii. 96
 — —, as basis of modern law of prize, vi. 107
 Naval Prize Act (1918), vi. 107, 108
 Naval Warfare, Retaliation in (Professor A. Pearce Higgins), viii. 129-46

"Navicerts", vii. 52, 53
 Navigation on the Rhine, Freedom of
 (E. Borel), ii. 75-89
Nebraska, case of the, i. 162
Neer v. Mexico, case of, viii. 184; ix. 29
Nereide, case of the, iii. 73; vii. 43 n.
Netherlands American Steam Navigation
Co. v. H.M. Procurator-General, case
 of, vii. 48, 211, 214, 215
Netherlands South African Railway Co. v.
Fisher, case of, iv. 53 n., 56 n.
 Neuilly, Treaty of, judgment of Per-
 manent Court of International
 Justice concerning interpretation of
 Art. 179, Annex, para. 4, vi. 195,
 197; vii. 138
Neuminster, case of the, iii. 64 n.
 Neutral Commerce in the War of the
 Spanish Succession and the Treaty
 of Utrecht (G. N. Clark), ix. 69-83
 — transport of belligerent troops, the *Greta*
 case, iii. 188
 — vessels, Removal of enemy persons
 from: the *Trent* and the *China*
 (H. W. Malkin), v. 66-77
 Neutrality of Brazil, The, i. 125-37
 —, The pre-war Theory of (V. M. S.
 Crichton), ix. 101-11
New Sweden, case of the, iii. 195
New York Life Assurance Co. v. Public
Trustee, case of, vii. 211, 216, 217
Newton, case of the, i. 50
Niboyet v. Niboyet, case of, ix. 182; x. 255
 Nicholl, Sir John, Notebooks of, iv. 80;
 viii. 62, 63
Nicolay and Martha, case of the, viii.
 72 n.
Nierhaus, in re, case of, i. 177
 Night Work in Bakeries, Draft Convention
 concerning, vii. 196
Nina, case of the, i. 69 n.
Niobe, case of the, vii. 49 n.
Nitrate Railway Co. Ltd. v. Chile, case of,
 viii. 182 n.
Noordam, case of the, ii. 203; iv. 52;
 ix. 35
Norske Atlas Insurance Co. Ltd. v. London
General Insurance Co. Ltd., case of,
 ix. 173, 187
North American Dredging Company of
Texas v. United Mexican States,
 case of, viii. 181; ix. 48 n.
North Atlantic Coast Fisheries Arbitration
 (1910), vi. 111; vii. 116; ix. 124
 Norway and the U.S.A., Arbitration case
 between (1922), iv. 159; x. 40
 Notes, ii. 174; iii. 179; iv. 159; v. 179;
 vi. 188; vii. 185; ix. 112; x. 208
 Nullity of arbitral awards, Hague Conven-
 tions and the, ix. 114-17
 Nys, Ernest, obituary notice of, ii. 205

Oakes v. United States, case of, vi. 104

Obituary Notices:

Baker, Sir G. S., iv. 190
 Butler, Sir Geoffrey, x. 206
 Bate, John Pawley, ii. 207
 Bellot, H. H. L., x. 204
 Clunet, Maitre, iv. 187
 Finlay, Viscount, x. 190
 Goudy, Henry, ii. 209
 Holland, Sir Erskine, K.C., vii. 184
 Lammasch, Heinrich, i. 223
 Macdonell, Sir John, ii. 204
 Mellor, Sir John, x. 201
 Nys, Ernest, ii. 205
 Oppenheim, Professor, i. 1
 Phillimore, G. G., vii. 183
 Phillimore, Lord, x. 197
 Pitt Cobbett, Dr., i. 235
 Richards, Sir H. Erle, iii. 16
 Salmond, Sir John, vi. 187
 Takahashi, Dr. Sakuyé, ii. 210
 Whittuck, E. A., v. 1
 Obligatory Jurisdiction of the Permanent
 Court of International Justice
 (Professor P. J. N. Baker), vi. 68-
 102
 Obscene Literature Convention, v. 195
 Occupation of the Ruhr, Legality of the
 (A. D. McNair), v. 17-37
Ocean, L', case of, i. 86, 87
Ocean, case of the, iii. 93; viii. 71, 72 n.
Oetjen v. Central Leather Co., case of, ii.
 62 n.
 Official Publications (British), ii. 255; iii.
 244; iv. 222; v. 244; vi. 248; vii.
 259; viii. 227; ix. 221; x. 299
Ogden v. Ogden, case of, ix. 127, 182,
 183
 Oleron, Laws of, ii. 102
Ononya, case of the, ii. 74 n.
Ophelia, case of the, i. 64, 65; iii. 63 n.;
 ix. 64 n.
 Opium and Dangerous Drugs Convention,
 v. 203.
 Opium smoking, Convention for the sup-
 pression of, vii. 189
 Oppenheim, Professor, obituary notice of,
 i. 1
Orcesi v. Ministry of War, case of, v. 176
 Order of the Golden Fleece, origin and
 character of, iv. 127, 128
Orduna, case of the, i. 162
Orinoco Shipping & Trading Co. v. The
Venezuelan Government, vii. 181,
 182; ix. 116.
Orozembo, case of the, iii. 188
Orteric, case of the, ii. 203
Ortigia-Oncle Joseph case, the, ix. 143
Oscar II, case of the, ii. 203
Owners of s.s. Victoria v. Owners of the
Quillwark, vi. 134

- Oyster fisheries, territorial jurisdiction in relation to, vi. 154
- Ozawa v. The United States*, case of, iv. 171 n.
- Pacific settlement of International Disputes, General Act for the, 1928, x. 226
- Pact of Paris, Some implications of the (Professor J. L. Brierly), x. 208
- Palestine concessions of M. Mavrommatis, Permanent Court of International Justice and the, vi. 193, 196; ix. 144 et seq.
- Palestine, Legal Administration of, under the British military occupation (N. Bentwich), i. 139-48
- , The Mandate for (N. Bentwich), x. 137-43
- and Mesopotamia, Mandated territories (N. Bentwich), ii. 48-56
- , Nationality Law in, vii. 100 et seq.
- , Russian property in, v. 84 et seq.
- Palinurus*, case of the, viii. 76 n.
- Pampa*, case of the, vi. 130, 131
- Pan-American and League of Nations Treaties of Arbitration and Conciliation (Sir John Fischer Williams), x. 14-31
- Pan-American Union and the codification of International Law, vii. 14 et seq.
- Paquete Habana* and the *Lola*, case of the, vi. 23 n., 24
- Paris, The Declaration of, Inner History of (H. W. Malkin), viii. 1-44
- Parker, William A.*, case of, viii. 183; ix. 164
- Parkinson v. Potter*, case of, ix. 61 n.
- Parlement Belge*, case of the, ii. 65, 67, 68, 69, 70, 71, 73; iii. 24, 162 n., 163 n.; vi. 128, 132, 141, 142; viii. 202; ix. 60
- Parliament, Submission of treaties to, v. 190; vi. 188
- Partnership between national and enemy, effect of war on, viii. 203
- Passage, right of, through territorial waters, iii. 53
- Passengers on foreign merchantmen, i. 73
- Paulina*, case of the, viii. 79
- Peace, the Law of (Professor A. Pearce Higgins), iv. 153-8
- Peace Treaty in its effects on private property (E. J. Schuster), i. 167-89
- Peacock*, case of the, i. 154
- Pearl Fisheries, territorial jurisdiction in relation to, vi. 154
- Pecuniary Claims Arbitration: *Hardman* case, ii. 197
- R. E. Brown* case, v. 210
- Zafiro* case, vii. 205
- Pecuniary Claims Commission, ii. 193
- Pedro*, case of the, iii. 71 n.; viii. 164
- Pegasus*, case of the, viii. 78
- Pelletier, Antonio*, case of, i. 59; ix. 158
- Pellworm*, case of the, i. 279; ii. 67 n.; iii. 194
- Pelterie, Esnault, Joystick patents* case, vii. 227 et seq.
- Penelope*, case of the, viii. 75
- Pensions and allowances, claims for, under Treaty of Versailles, iv. 162-6
- Periodical publications dealing with International Law, i. 274; ii. 252; iii. 241; iv. 217; v. 243; vi. 247; vii. 258; viii. 226
- Perkeo*, case of the, iii. 64 n.
- Permanent Court of International Arbitration, case between Norway and U.S.A. before, iv. 159
- Permanent Court of International Justice, The (Sir F. Pollock), vii. 135-40
- —, Advisory Opinions of, iv. 172; v. 206; vi. 197; vii. 201; viii. 154; ix. 149; x. 240
- — and Compulsory Jurisdiction (Dr. B. C. J. Loder), ii. 6-26
- —, The Council's request for an Advisory Opinion from the (A. D. McNair), vii. 1-13
- —, Judgments of, v. 204; vi. 193; vii. 197; viii. 147; ix. 135; x. 231
- —, The Jurisdiction of the (Sir H. Erle Richards), ii. 1-5
- —, The obligatory jurisdiction of the (Professor P. J. N. Baker), vi. 68-102
- —, Publications of, iv. 224; v. 243; vi. 248; vii. 259; viii. 227; ix. 220; x. 298
- —, decision in *Chorzow* case, ix. 6 et seq.
- —, The United States and the, x. 210
- Permanent Mandates Commission, iv. 143-5
- "Personal" law, the principle of: some recent decisions, ix. 126
- Peru, Republic of, v. Dreyfus Bros. & Co.*, case of, ii. 60 n.
- Peru, Republic of, v. Peruvian Guano Co.*, case of, ii. 66 n.
- Pesaro*, case of the, vi. 131, 140, 143; viii. 202
- Peterhoff*, case of the, iii. 95 n.
- Peton* claim before Franco-Venezuelan Commission, vii. 174
- Petrolite*, case of the, iii. 124
- Philips v. McDonald*, case of, vii. 172
- Phillimore, George Grenville, obituary notice of, vii. 183
- Phillimore, Lord: An International Criminal Court and the Resolutions of the Committee of Jurists, iii. 79-86
- , obituary notice of, x. 197

- Phoenix*, case of the, see *Fenia*
 Picciotto, C. M.: The Anglo-German Mixed Arbitral Tribunal, iv. 179
Pickard v. Sears, case of, v. 34
Piepenbrink, case of, v. 71 n.
 Piepowder, International court of, Wanted! (Sir Cecil J. B. Hurst), vi. 61-7
 Pious Funds Arbitration, v. 35; vii. 114, 116
 Piracy, concurrent jurisdiction in, vi. 148
 Place of Commissions of Inquiry and Conciliation in the Peaceful Settlement of International Disputes (C. C. Hyde), x. 96
 Poland and Germany, litigation between as to expropriations in Upper Silesia, ix. 6 et seq.
 —, German settlers in, advisory opinion of Permanent Court of International Justice concerning, v. 207
 "Police power", doctrine of the, in U.S.A. ix. 23 et seq.
 Polish-Czechoslovak frontier, advisory opinion of Permanent Court of International Justice on, v. 209
 Polish nationality, acquisition of, advisory opinion of Permanent Court of International Justice on, v. 208
 Polish postal service in Danzig, advisory opinion of the Permanent Court of International Justice concerning, vii. 201
 Polish Upper Silesia, German claims in, before Permanent Court of International Justice, vii. 197 et seq.; viii. 147-53; ix. 6 et seq., 135 et seq.
Polka, case of the, ii. 182
 Pollock, Sir Frederick: The Permanent Court of International Justice, vii. 135-40
Polly, case of the, iv. 84; viii. 67
Polzeath, case of the, iv. 50, 57
Ponte, case of the, viii. 63 n.
Poona, case of the, iv. 50.
 Populations, exchange of Greek and Turkish, advisory opinion of Permanent Court of International Justice concerning, vi. 198
Porter v. Freudenberg, case of, i. 171; iv. 67, 68, 75; ix. 65
Portland, case of the, iv. 70
Porto, case of the, iii. 64 n.
Porto Alexandre, case of the, i. 280; ii. 65, 69, 70, 73; iii. 162 n.; vi. 132, 140 n., 142
 Ports, maritime, convention and statute on international régime of, v. 200
 Portuguese Religious Properties expropriation case, vi. 167; ix. 2, 3; x. 37
 Position of Switzerland in the League of Nations (R. B. Mowat), iv. 90-4.
 Postal Congresses, International (H. R. Turkel), x. 171-80
 Postal correspondence, right of interference with, during war, ix. 31 et seq.
Potrimpos, case of the, viii. 76
Poubé's case, vi. 53 n.
Prevost case before French and American Claims Commission, vii. 170
 Pre-war Theory of Neutrality, The (V. M. S. Crichton), ix. 101-11
Princess Thurn and Taxis v. Moffitt, case of, iv. 65, 66
Prins der Nederlanden, case of the, i. 278; ii. 202
Printing Co. v. Sampson, case of, v. 16
Prinz Adalbert, case of the, iii. 58 n., 64 n., 78 n.
 Private International Law, see International Law, Private
 Private Property, the Peace Treaty in its effects on (E. J. Schuster), i. 167-89
 Prize Case Notes in the days of Stowell (C. J. B. Gaskoin), iv. 78-89
 Prize Court, Belgian, decisions of, ii. 180-92
 Prize Court Procedure (E. S. Roscoe), ii. 90-8
 Prize Courts, British, and the War (Sir H. Erle Richards), i. 11-34
 Prize, Ships of war as (Professor A. Pearce Higgins), vi. 103-10
 Problems of Air Law (Professor J. E. G. de Montmorency), ii. 167-73
 Prohibition Law of U.S.A., applicability of, to foreign ships entering American ports (J. A. Barratt), v. 184
 Property of Aliens, International Law and the (Sir J. Fischer Williams), ix. 1-30
 —, —, (A. P. Fachiri), x. 32-55
 Property, private, Peace Treaty in its effects on (E. J. Schuster), i. 167-89
 —, Return of enemy, by the United States (Professor J. W. Garner), ix. 129
Prosper, case of the, iii. 55, 67, 68; ix. 37
 Protection of Minorities, The (I. L. Evans), iv. 95-123
 Protectorate, Power of League of Nations to hold a, v. 138
P.S. Wilts v. United States, case of, vii. 169
 Publications, Official, list of, ii. 255; iii. 244; iv. 222; v. 244; vi. 248; vii. 259; viii. 227; ix. 221
Purcell v. Deputy Federal Commissioner of Taxation, case of, iv. 149 n.
Putnam, Ida Robinson Smith, case of, ix. 45, 163

- Quarrier v. Coulston*, case of, ix. 187
Queen case between Brazil and Norway, ix. 163
Queen v. Sir John Constable, case of, iv. 39 n.
Quintanilla et al., case of, viii. 185; ix. 162
- R. v. Allen*, case of, i. 71 n.
R. v. Anderson, case of, i. 71
R. v. Armstrong, case of, viii. 115 n., 121
R. v. Arnaud & Powell, case of, iv. 50, 55, 57; viii. 162
R. v. Bruce, case of, i. 62 n.; ii. 136 n.
R. v. Carr, case of, i. 71
R. v. Combs, case of, vi. 53 n.
R. v. Coombes, case of, viii. 116, 120, 121, 123, 125 n.
R. v. Cunningham, case of, i. 62, 64; iii. 44, 47, 48; viii. 191
R. v. Forty-nine casks of brandy, case of, iii. 46; viii. 190
R. v. Holmes, case of, vi. 54 n.; viii. 121
R. v. Jacobus Christian, case of, x. 69 n.
R. v. Jemot, case of, i. 71 n.
R. v. Keyn, case of, i. 64, 65; iii. 45; iv. 34, 35; vi. 25 n., 29; viii. 110, 112 n., 117 n., 126, 127, 190; ix. 120, 121, 125; x. 68 n.
R. v. Leander, case of, iii. 35 n.
R. v. Lewis, case of, vi. 53 n.; viii. 117 n.
R. v. Moscovitch, case of, x. 250, 261
R. v. Most, case of, vi. 54 n.
R. v. Nillins, case of, vi. 53 n.; viii. 126
R. v. Oliphant, case of, vi. 53 n.
R. v. Veltheim, case of, vi. 53 n.; viii. 126 n.
Raeburn v. Raeburn, case of, x. 247, 257
Railways, international régime of, convention and statute on, v. 198
Ran, case of the, i. 277
Rannveig, case of the, iii. 195
Rebecca, case of the, viii. 65 n.
Rebus sic stantibus, doctrine of, x. 111
Recognition of States and Governments, and the Immunity of Public Ships (A. D. McNair), ii. 57-74
Recovery, case of the, x. 65, 93 n.
Regina d'Italia, case of the, vii. 47 n.
Reinman v. Little Rock, case of, ix. 24 n.; x. 52
Reparation Commission and Government of U.S.A., arbitration between (Tankers case), viii. 156; x. 45
Republic of Peru v. Dreyfus, case of, ix. 191
Republic of Peru v. Peruvian Guano Co., case of, ii. 66 n.
Republica de Guatemala v. Nunez, case of, ix. 171, 173, 183
Reservations to multilateral conventions (H. W. Malkin), vii. 141-62
- Resolutions of Committee of Jurists* (The Hague, 1920) as to International Criminal Court, iii. 79
Respect, case of the, viii. 79 n.
Responsibility of the state for acts of local officials, ix. 160-2
— for acts of military forces, ix. 159, 160
—, International, of States for judgments of Courts and Verdicts of Juries amounting to Denial of Justice (Professor J. W. Garner), x. 181-9
— for collision: presumption of culpability, ix. 163, 164
— for illegal imprisonment and delay of proceedings, ix. 160
— for murder by bandits, effect of amnesty, ix. 163
Retaliation in Naval Warfare (Professor A. Pearce Higgins), viii. 129-46
Reviews of Books:
Académie de Droit International, Recueil des Cours, x. 262
Antonelli, E., L'Afrique et la Paix de Versailles, iv. 206
Ariga, Dr. N., La Chine et la Grande Guerre Européenne au point de vue du Droit International, ii. 238
Armstrong, J. W. Scobell, War and Treaty Legislation, 1914-22, iv. 203
Bagdat, Elise, La "Querela Pacis" d'Erasmus, vii. 246
Baker, P. J. N., The Geneva Protocol, vi. 232
Bewes, W. A., The Romance of the Law Merchant, v. 232
Bibliotheca Visseriana, vol. i, 1923, v. 229
Bisschop, W. R., The Saar Controversy, v. 234
Bosmans, C. J. E., and Visser, M., Répertoire des traités et des engagements internationaux concernant les Pays-Bas (1845-1900), x. 263
Brierly, J. L., The Law of Nations, x. 263
Bussmann, O., Der Völkerrechtliche Garantievertrag, insbesondere seit der Entstehung des Genfer Völkerbundes, ix. 197
Butler, Sir Geoffrey, A Handbook to the League of Nations, i. 281
—, and Maccoby, S., *The Development of International Law*, x. 264
Colijn, H. A., La Décision de la Société des Nations concernant les Îles d'Aland, v. 232
Colombos, C. J., A Treatise on the Law of Prize, viii. 212

Reviews of Books—*continued*

- Corbett, P. E., and Smith, H. A., Canada and World Politics, x. 265
- David, G., Die Befriedung Europas, ix. 192
- Davis, W., and Mallory, W. H., Political Handbook of the World, Parliament, Parties, and Press, x. 267
- Dicey, A. V., and Keith, A. B., A Digest of the Law of England with reference to the Conflict of Laws, iv. 194
- Deák, F., The Hungarian-Rumanian Land Dispute, x. 267
- Eagleton, C., The Responsibility of States in International Law, x. 267
- Fachiri, A. P., The Permanent Court of International Justice, Its Constitution, Procedure, and Work, vii. 238
- Fauchille, Paul, and Bonfils, Henri, Traité de Droit International Public, 8me ed., ii. 224; vii. 233
- Fenwick, C. G., International Law, vi. 234
- Foote, Private International Law, 5th ed. (H. H. L. Bellot), viii. 217
- Foulke, R. R., A Treatise on International Law, with an Introductory Essay on the Definition and Nature of the Laws of Human Conduct, ii. 235
- Garner, J. W., American Foreign Policies, ix. 193
- , —, International Law and the Great War, ii. 223
- , —, Prize Law during the World War, ix. 192
- , —, Recent Developments in International Law, vii. 237
- Goebel, Julius, jr., The Struggle for the Falkland Islands, ix. 194
- Gonsiorowski, M., Société des Nations et Problème de la Paix, x. 268
- Grotius Annuaire International, 1921-22, 1923, iv. 205
- Grotius Society Publications, Selections from the Second Edition of the Abrégé du Projet de Paix Perpetuelle of C. J. Castel de St. Pierre (Trans. by H. H. Bellot), viii. 205
- , Jeremy Bentham's Plan for a Universal and Perpetual Peace, with an Introduction by C. J. Colombos, viii. 208
- Grotius Society, Transactions of the, vol. v, "Problems of Peace and War", i. 281; vol. viii, x. 270
- Hall, International Law, 8th ed. (A. Pearce Higgins), vi. 227
- Hall, J. A., The Law of Naval Warfare, iii. 226
- Hatschek and Strupp, Wörterbuch des Völkerrechts und der Diplomatie, iv. 199; vi. 236
- Henry, Noël, Les Gouvernements de Fait devant le Juge, ix. 213
- Heyking, Baron A. de, L'Exterritorialité, viii. 216
- Higgins, A. P., Studies in International Law and Relations, x. 271
- Holland, Sir T. E., Letters to *The Times* upon War and Neutrality, with some Commentary, ii. 237
- Hough, C. M., Cases in Vice-Admiralty and Admiralty, New York, 1715-88, vii. 234
- Hudson, Manley O., The Permanent Court of International Justice and the Question of American Participation, vii. 248
- Hughes, C. E., The Supreme Court of the United States, x. 272
- Hyde, C. C., International Law chiefly as interpreted and applied in the United States, iii. 217
- Jahrbuch des Völkerrechts, ii. 239; iv. 203
- Jessup, P. C., The Law of Territorial Waters and Maritime Jurisdiction, ix. 195
- Kaufmann, Paul, Die Fortbildung der internationalen Schiedsgerichtsbarkeit seit dem Weltkrieg, besonders durch den Locarno-Pakt, ix. 197
- Keetman, Ernst, Die "Avoirs en numéraire" (cash assets) im Verträge von Versailles, ix. 198
- Keynes, J. M., A Revision of the Peace Treaty, iii. 220
- Knowles, G. W., Quakers and Peace, ix. 198
- Kunz, Josef L., Gaskrieg und Völkerrecht, viii. 220
- , —, Die völkerrechtliche Option, ix. 199
- Lammasch, H., Völkermord oder Völkerbund, ii. 238
- Lauterpacht, H., Private Law Sources and Analogies of International Law, ix. 200
- Lavallaz, M. de, Essai sur le Désarmement et le Pacte de la Société des Nations, ix. 203
- Le Roy, A. R., L'Abrogation de la Neutralité de la Belgique: ses causes et ses effets, v. 235

Reviews of Books—*continued*

- Louter, J. de, *Le Droit International Public Positif*, ii. 234
- Lucien-Graux, Dr., *Histoire des Violations du Traité de Paix*, iv. 201; v. 232
- Masterson, W. E., *Jurisdiction in the Marginal Seas with special reference to smuggling*, x. 274
- Matsunami, N., *Immunity of State Ships*, vi. 239
- Merignhac A., and Lèmonon, E., *Le Droit des Gens et la Guerre de 1914-18*, iii. 221
- Mowat, R. B., *A History of European Diplomacy*, iv. 205
- Moye, M., *Le Droit des Gens Moderne*, ii. 236
- Muller, A., *Folkeretten i Fredstid og Krigstid*, vii. 237
- Mullins, C., *The Leipzig Trials. An Account of the War Criminals' Trials and a Study of German Mentality*, iii. 219
- Murville, H. C. de, *Le Gouverneur dans les Dominions britanniques*, x. 277
- Niemeyer, Th., *Völkerrecht*, iv. 197
- , —, *Handbuch des Abrüstungsproblems*, x. 277
- , —, *Allgemeines Völkerrecht des Küstenmeers*, viii. 219
- , Rühland, C., and Spiropoulos, J., *Der Völkerbund: Verfassung und Funktion*, viii. 219
- Nippold, O., *The Development of International Law after the World War*, iv. 197
- Oda, Yorodzu, *Principes de Droit Administratif du Japon*, ix. 205
- Oppenheim, *International Law*, 3rd ed. (R. F. Roxburgh), ii. 232; iii. 224
- , —, 4th ed. (A. D. McNair), viii. 204; x. 273
- Philippe, A. H., *Le Rôle du Conseil de la Société des Nations dans le Réglement pacifique des différends internationaux*, x. 279
- Pufendorf, *De Officio hominis et civis iuxta legem naturalem libri duo*, x. 280
- Ralston, J. H., *The Law and Procedure of International Tribunals*, viii. 214
- Redslob, R., *Histoire des grands principes du droit des gens depuis l'antiquité jusqu'à la veille de la grande guerre*, iv. 191
- , —, *Théorie de la Société des Nations*, ix. 206
- Rippy, J. F., *Rivalry of the United States and Great Britain over Latin-America, 1808-1830*, x. 281
- Rodick, B. C., *The Doctrine of Necessity in International Law*, x. 282
- Root, Elihu, *The "Great War" and International Law*, iii. 228
- Royse, M. W., *Aerial Bombardment and the International Regulation of Warfare*, x. 283
- Sack, A. N., *Les Effets des Transformations des États sur leurs Dettes publiques et autres obligations financières*, viii. 209
- Saenz, M., and Priestley, H., *Some Mexican Problems*, viii. 220
- Satow, Sir. E., *A Guide to Diplomatic Practice*, iv. 193
- Sayre, F. B., *Siam Treaties with Foreign Powers, 1920-1927*, x. 284
- Schaeffer, C., and Brode, H., *Völkerrecht (Band XV), Grundriss des Privaten und Öffentlichen Rechts*, v. 236
- Schätzler, W., *Die elsass-lothringische Staatsangehörigkeitsregelung und das Völkerrecht*, x. 284
- Schindler, D., *Die Verbindlichkeit der Beschlüsse des Völkerbundes*, ix. 208
- Scott, J. B., *The Development of Modern Diplomacy*, iii. 228
- , —, *Prize Cases decided in the United States Supreme Court, 1789-1918*, v. 231
- , —, *Sovereign States and Suits before Arbitral Tribunals and Courts of Justice*, vii. 242
- Secretan, J., *Les immunités diplomatiques des représentants des états Membres et des agents de la Société des Nations*, x. 286
- Smith, H. A., *The American Supreme Court as an International Tribunal*, ii. 229
- Smith, Munroe, *The Development of European Law*, x. 287
- Spaight, J. M., *Air Power and War Rights*, vi. 229
- Spiropoulos, J., *Die de facto Regierung im Völkerrecht*, viii. 219
- Stockton, C. H., *A Manual of International Law for the use of Naval Officers*, iii. 227
- Stowell, E. C., *Intervention in International Law*, iii. 226
- Stoyanovsky, J., *La Théorie général des Mandats Internationaux*, vi. 238

Reviews of Books—*continued*

- Streit, G., *Der Lausanner Vertrag und der griechisch-türkische Bevölkerungsaustausch*, x. 284
- Strupp, Karl, *Eléments du Droit International Public universel, européen et américain*, viii. 213
- , —, *Grundzüge des positiven Völkerrechts*, viii. 215
- , —, *Die völkerrechtliche Haftung des Staates, insbesondere bei Handlungen Privater*, ix. 209
- , —, *Theorie und Praxis des Völkerrechts*, vii. 242
- , —, *Das völkerrechtliche Delikt*, ii. 239
- , —, *Das Werk von Locarno*, vii. 247
- Taube, M. von, *Russland und Westeuropa*, x. 284
- Thieme, H. W., *Die Fortbildung der internationalen Schiedsgerichtsbarkeit seit dem Weltkrieg*, ix. 197
- Travers, M., *Le Droit pénal international et sa mise en œuvre en temps de paix et en temps de guerre*, ii. 226; iii. 223; v. 235
- , —, *L'Entraide répressive internationale et la Loi française du 10 Mars, 1927*, x. 288
- Urrutia, J., *Le Continent américain et le Droit International*, x. 289
- Van Rees, D. F. W., *Les Mandats Internationaux*, ix. 208
- Verdross, A., *Die Verfassung der Völkerrechtsgemeinschaft*, viii. 214
- Verzijl, J. H. W., *Le Droit des Prises de la Grande Guerre*, vii. 240
- Waldkirch, E. von, *Das Völkerrecht in seinen Grundzügen dargestellt*, viii. 211
- Walz, G. A., *Die Abänderung völkerrechtsgemässen Landesrechts grundsätzliche Untersuchungen zum Englischen, Amerikanischen, Deutschen und Oesterreichischen Recht*, ix. 210
- Wambaugh, S., *A Monograph on Plébiscites, with a collection of Official Documents*, iv. 204
- Wehberg, *Die Völkerbundssatzung*, ix. 211
- Westlake, *A Treatise on Private International Law with principal reference to its Practice in England*, 6th ed. (N. Bentwich), iv. 196
- , *International Law*, 7th ed. (N. Bentwich), vii. 244

- Williams, I., *The Swiss Civil Code*, vii. 250
- Wright, Quincey, *The Control of American Foreign Relations*, iv. 192
- Young, G., *Diplomacy old and new*, iii. 229
- Yu, Tsune-chi, *The Interpretation of Treaties*, ix. 212
- Revision Clause in certain Chinese Treaties (G. W. Keeton), x. 111–36
- Rhine, *Freedom of navigation on the* (Professor E. Borel), ii. 75–89
- Rhode Island v. the State of Massachusetts*, case of, i. 39 n.
- Ricaud v. American Metal Co.*, case of, ii. 62 n.
- Richards, George D.*, case of, ix. 159
- Richards, Sir H. Erle: *British Prize Courts and the War*, i. 11–34
- , —: *Contraband*, iii. 1–15
- , —: *The Jurisdiction of the Permanent Court of International Justice*, ii. 1–5
- , —, *obituary notice of*, iii. 16–20
- Richardson v. Richardson*, case of, ix. 169, 179, 180
- Richmond, Vice-Admiral Sir Herbert: *Value of the right of capture at sea in war*, ix. 50–8
- Ricket v. Metro. Rly.*, case of, x. 39 n.
- Rieger, in re*, case of, viii. 178
- Riggs v. Insurance Co.*, case of, viii. 162
- Right of capture at sea in time of war*, value of (Sir H. Richmond), ix. 50–8
- Rio Grande case*, vii. 117
- Rioja*, case of the, vii. 50 n.
- Rivers of International Concern, *British Policy and the Regulation of European* (Ruth Bacon), x. 158–70
- Robert E. Brown claim*, award of Anglo-American Pecuniary Claims Commission, v. 210
- Roberts case*, the, viii. 184
- Roberts v. Attorney General*, case of, iv. 147 n.
- Robinson v. Bland*, case of, ix. 187
- Robson v. Premier Oil and Pipe Line Co.*, case of, iv. 56 n.
- Roll De Superioritate Maris Angliae*, The (T. C. Wade), ii. 99–108
- Roper, Margaret*, case of, ix. 161, 162
- Roscoe, E. S.: Prize Court Procedure*, ii. 90–8
- Roselius & Co. v. Karsten*, case of, x. 69 n.
- Roseric*, case of the, vi. 130, 140
- Rosler v. Hilbery*, case of, vii. 214, 223, 224; viii. 190
- Rostock*, case of the, iv. 65 n.

- Rothersand*, the *Tommi* and the, case of, iv. 50
- Rothschild v. Administrator of Austrian Property*, case of, vii. 212, 217, 218
- Roumania, dispute with Hungary as to expropriation of rural landowners in Transylvania, ix. 1, 117
- Roumanian*, case of the, iv. 52
- Rovena*, case of the, viii. 79 n.
- Roxburgh, R. F.: Submarines at the Washington Conference, iii. 150-8
- Rudd v. Rudd*, case of, vii. 213, 214, 222, 223
- Ruding v. Smith*, case of, ix. 170
- Ruhr, Legality of the Occupation of the (A. D. McNair), v. 17-37
- Rules of evidence in international proceedings, x. 220
- Rumania, *see* Roumania
- Russian citizenship decree (1921), viii. 45
- Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse*, case of, v. 80, 226; vii. 213, 221; ix. 179
- Russian property in foreign countries, The Soviet Government and (N. Bentwich), v. 78-88
- Ruty* case before French and American Claims Commission (1884), vii. 172
- Saar Territory (Prussian Officials)* case, x. 69 n.
- Sabatier v. The Trading Company*, case of, ix. 174, 189, 190
- Sagor* case, the, ii. 60, 61, 62, 64, 65, 203; x. 245
- St. Eustatius* case, iv. 84 n.
- St. Juan Baptista*, case of the, viii. 66, 67
- St. Naoum, Monastery of, advisory opinion of Permanent Court of International Justice concerning, vi. 197
- St. Tudno*, case of the, iv. 50, 57
- Sally*, case of the, i. 50; viii. 75 n.
- Sally* (Choate), case of the, iv. 85
- Salomon v. Salomon & Co.*, case of, iv. 46, 47
- Salmond, Sir John, obituary notice of, vi. 187
- Salomé Lerma de Galvan*, case of, ix. 159
- Salvador Commercial Co.* case, viii. 173
- Salvesen or Von Lorang v. Administrator of Austrian Property*, case of, ix. 127, 169, 181, 182
- Sanitary District of Chicago v. United States*, case of, x. 146
- Samsen*, case of the, iii. 58 n., 61
- Santa Cruz*, case of the, iii. 55 n.
- Santa Isabel* case, viii. 180; ix. 156 n.
- Santa Isabella*, case of the, i. 153; vi. 103
- Sarpen*, case of the, vi. 209 n.
- Savage, Henry*, case of, ix. 6 n.; x. 35
- Sawyer v. Commonwealth*, case of, x. 39 n.
- Saaby v. Fulton*, case of, ix. 173
- Schaffenius v. Goldberg*, case of, i. 171; iv. 66
- Scheldt, The, x. 158
- Schintz v. Warr*, case of, viii. 190, 200, 201
- Schnapper, In re*, case of, x. 247
- Schoone Sophie*, case of the, viii. 76 n., 79
- Schuster, E. J.: The Peace Treaty in its Effects on Private Property, i. 167
- Scotland v. South African Territories, Ltd.*, case of, iv. 53 n., 68.
- Scotto*, case of the, i. 52 n.
- Sea?, Whose is the bed of the (Sir Cecil J. B. Hurst), iv. 34-43
- Sea King*, case of the, iii. 160
- Seager v. Seager*, case of, vii. 214, 223
- Search and Detention, Visit (Professor A. Pearce Higgins), vii. 43-53
- Secretary of State for Foreign Affairs v. Charlesworth Pilling & Co.*, case of, vii. 132, 133
- Secretary of State for India v. Chellikani Rama Rao*, case of, iv. 38 n.
- Sedgwick Collins & Co. v. Rossia Insurance Co. of Petrograd*, case of, viii. 199, 200
- Seisin, Sovereignty and the League of Nations (Sir J. Fischer Williams), vii. 24-42
- Seizure of enemy vessels at outbreak of war, decision of U.S. Supreme Court regarding, viii. 203
- Selot's Trusts, In re*, case of, ix. 185
- Servitudes, So-called State (A. D. McNair), vi. 111-27
- Seven Bishops'* case, vi. 53 n.; viii. 117 n.
- Ship-money, Writ of Charles I, ii. 103
- Ships, enemy, in port at outbreak of war (Professor A. Pearce Higgins), iii. 55-78
- , Norwegian, requisition of, by U.S.A. in August, 1917, iv. 159, 160
- of war as Prize (Professor A. Pearce Higgins), vi. 103-10
- , Public, Immunity of, *see* Immunity
- , state-owned, employed in commerce, Immunities of (J. W. Garner), vi. 128-43
- Shively v. Bowlby*, case of, ix. 124
- Shortcomings of International Law, The (Professor J. L. Brierly), v. 4-16
- Sicilian Government and Great Britain, dispute over sulphur monopoly (1836), vi. 163; ix. 2; x. 34
- Sidra*, case of the, arbitration, vii. 117 ix. 164
- Sigmaringen*, case of the, iii. 60
- Sigurd*, case of the, ii. 202
- Silenus*, case of the, viii. 73 n.
- Simla*, case of the, ix. 34 n., 35

- Simonin v. Mallac*, case of, ix. 182
Sinclair v. Sinclair, case of, ix. 182
Slaughter House cases, ix. 23
Small, Rosetta, case of, ix. 162
Smith v. Baker, case of, v. 34 n.
Smith v. Wayne Probate Judge, case of, ix. 24
Smith, Professor H. A.: The Chicago Diversion, x. 144-57
Snapp, T. J., case of, ix. 163
Snipe, case of the, viii. 133 n.
Sobhuza II v. Miller et al., case of, viii. 187, 191
Société Anonyme des Grands Établissements du Touquet Paris-Plage v. Baumgart, case of, ix. 173, 187
Society for the Propagation of the Gospel v. Newhaven, case of, ii. 44
Society for the Propagation of the Gospel v. Wheeler (U.S.A.), case of, iv. 58
Soldiers, Carriage of sick and wounded, by hospital ship, ii. 177
Some implications of the Pact of Paris (J. L. Brierly), x. 208
Sommelsdijk, case of, see *Netherlands American Steam Navigation Co. v. H.M. Procurator-General*
Sotelo's case, i. 86
Sottomayer v. de Barros, case of, ix. 126, 169
Sources of the Law of Nations, Consent of States and the (P. E. Corbett), vi. 20-30
South Africa, Supreme Court of, decision in Jacobus Christian v. Rex, v. 227; vi. 211
South-West Africa, German settlers in, and nationality, vii. 101
— —, *Naturalization of Germans domiciled in*, vi. 188
Sovereignty (W. R. Bisschop), ii. 122-32
Sovereignty and the League of Nations (Sir Geoffrey Butler), i. 35-44
Sovereignty, national, in relation to property of aliens, ix. 18 et seq.
Sovereignty of the Seas, the Stewart claim to, ii. 99-108
Sovereignty, rights of, of the League of Nations, v. 126
Sovereignty, Seisin and the League (Sir John Fischer Williams), vii. 24-42
Soviet gold, note on the, ii. 62 n.
Soviet Government of Russia, its claims to recognition, ii. 59-67
Soviet Government and Russian property in foreign countries (N. Bentwich), v. 78-88
Spaight, J. M.: *Air Bombardment*, iv. 21-33
— —, *Air Navigation Convention, 1919*, v. 183
Spaight: The Doctrine of Air Force Necessity, vi. 1-7
Spanish Succession, Neutral commerce in the war of the, and the Treaty of Utrecht (G. N. Clark), ix. 69-83
Spinoza and International Law (H. Lauterpacht), viii. 89-107
Springbok, case of the, iii. 94
Staat Embden, case of the, iii. 191
Standard Oil Co., claim of, to certain tankers, viii. 156
Star, case of the, vii. 49 n.
State v. Carter, case of, vi. 53 n.
State complicity in international claims, Theory of implied (Professor J. L. Brierly), ix. 42-9
State liability for death of person in public custody, viii. 185
State liability for homicide by officer enforcing Government regulations, viii. 185
State of the City of the Vatican, The (Professor A. Pearce Higgins), x. 214
State-owned ships engaged in commerce, Immunities of (Professor J. W. Garner), vi. 128; viii. 202
State-owned ships, immunities of, in relation to Private International Law, vii. 76
State servitudes, so-called (A. D. McNair), vi. 111-27
State succession in matters of tort (Sir Cecil J. B. Hurst), v. 163-78
States, Admission of, to the League of Nations (L. M. Friedlander), ix. 84-100
States and Governments, Judicial recognition of, and the Immunity of Public Ships (A. D. McNair), ii. 57-74
States, The doctrine of Legal Equality of (Professor P. J. N. Baker), iv. 1-20
States, Immunity of, in maritime law (W. R. Bisschop), iii. 159-66
Statham v. Statham and the Gaekwar of Baroda, case of, ii. 65
Stathos v. Stathos, case of, x. 247
Stella Shipping Co. v. Sutherland, case of, ii. 73 n.
Stephens v. Stephens, case of, ix. 159
Stert, case of the, iii. 93; viii. 71, 72 n.
Stetson v. United States, case of, iii. 48
Stevenson case before Anglo-Venezuelan Claims Commission (1903), vii. 166 et seq., 173, 174
Stewart claim to sovereignty of the seas, ii. 99-108
Stigstad, case of the, i. 29 n., 280; iii. 73; viii. 136, 138, 140
Stoeck v. Public Trustee, case of, viii. 48 n., 49 n.

- Stollmeyer v. Trinidad Lake Petroleum Co.*, case of, x. 150
- Stork*, case of the, viii. 77 n.
- Stowell, Lord, Prize Court notes in the time of (C. J. B. Gaskoin), iv. 78-89
- Strassheim v. Darby*, case of, viii. 126
- Strother*, case of, ix. 158 n.
- Studer* case before the Anglo-American Pecuniary Claims Commission, vii. 163 et seq.
- Submarine Cables and International Law (Professor A. Pearce Higgins), ii. 27-36
- Submarine Warfare (Professor A. Pearce Higgins), i. 149-65
- Submarines at the Washington Conference (R. F. Roxburgh), iii. 150-8
- Submarines, Washington Conference and (H. W. Malkin), iii. 181
- Submission of treaties to Parliament, v. 190; vi. 188
- Sumatra*, case of the, vi. 136, 137
- Summary of Events, iii. 196; iv. 234; v. 248; vi. 251; vii. 265; viii. 232; ix. 225
- Superbo*, case of the, i. 52 n.
- Susan*, case of the, iii. 191
- Sutherland v. Mayer*, case of, viii. 203
- Sutton v. Sutton*, case of, ii. 44
- Svithiod*, case of the, i. 279
- Swaziland, appeal from Special Court of, *Sobhuza II v. Miller et al.*, viii. 191
- Swedish convoy, case of the, iii. 96
- Swedish note to Great Britain in 1854 on the rights of the Northern neutrals, viii. 4-6
- Swiss National Insurance v. Miller*, case of, ix. 130 n.
- Switzerland, position of, in the League of Nations (R. B. Mowat), iv. 90-4
- Takahashi, Dr. Sakuyé, obituary notice of, ii. 210
- Tallack v. Tallack*, case of, ix. 173, 188
- Tavignano* case, x. 96
- Tempest*, case of the, i. 53, 55 n., 56, 64
- Territorial Limits in the Bristol Channel, case of the *Fagernes*, ix. 120 et seq., 167, 174
- Territoriality of Bays, The (Sir Cecil J. B. Hurst), iii. 42-54
- Tervaele*, case of the, iii. 164 n.
- Tesdorff & Co. v. The German Government*, case of, iv. 179
- The State v. Carter*, case of, vi. 53 n.
- Theory of implied state complicity in international claims (Professor J. L. Brierly), ix. 42-9
- Thirty Hogsheads of Sugar v. Boyle*, case of, x. 68 n.
- Thomyris*, case of the, viii. 76, 77
- Thorneley, P. W.: Extraterritoriality, vii. 121-34
- Tingley v. Müller*, case of, iv. 54 n., 61, 66, 67
- Toberman, Mackey & Co.*, case of, ix. 157
- Tommi and the Rothersand*, case of the, iv. 50
- Tort, State Succession in matters of (Sir Cecil J. B. Hurst), v. 163-78
- Toulmin, G. E.: The Barcelona Conference on Communications and Transit and the Danube Statute, iii. 167-78
- Trade Agreement between British and Russian Soviet Governments, ii. 63 n.
- Traffic in Women and Children, International Conference on, ii. 175
- Transfer of territory, valid conditions for, vii. 25-31
- Transit and Communications Conference at Barcelona (*see also under Barcelona*), ii. 174-5
- Transjordan, The Mandate for, x. 212
- Traversi v. The Treasury*, case of, v. 176
- Treaties affecting any part of the British Empire, Negotiation and Conclusion of, v. 193
- , British, When do they involve legislation? (A. D. McNair), ix. 59-68
- , Two recent Canadian (N. MacKenzie), vi. 191
- , The effect of war on (Sir Cecil J. B. Hurst), ii. 37-47
- , Submission of, to Parliament, v. 190; vi. 188
- , the League of Nations Journal and Register of, ii. 165
- Treatment of Mails in time of war (Professor A. Pearce Higgins), ix. 31-41
- Treaty, commercial, between Canada and Belgium, vi. 192
- Treaty-making power of the Dominions, The (M. M. Lewis), vi. 31-43
- Treaty of Neuilly, Article 179, Permanent Court of International Justice and the interpretation of, vi. 195
- of St. Germain, International arbitrations under, iv. 124
- of Utrecht, Neutral Commerce in the War of the Spanish Succession and the (G. N. Clark), ix. 69-83
- of Versailles and the Nationality of incorporated companies, iii. 186-8
- of Versailles, Article 389, para. 3, advisory opinion of the Permanent Court of International Justice on, iv. 173
- of Versailles, claims for pensions and allowances under, iv. 162-6
- Trent and the China*, the (H. W. Malkin), v. 66-77

- Triquet v. Bath*, case of, x. 68 n.
- Trimbey v. Vignier*, case of, ix. 186
- Troops, carriage of belligerent, by a neutral transport, iii. 188
- Trusts and Mandates (J. L. Brierly), x. 217
- Tubantia*, case of the, vii. 213, 221, 222; ix. 35; x. 96
- Tunis and Morocco (French zone), Nationality decrees in, advisory opinion of the Permanent Court of International Justice on, iv. 175; v. 5; vii. 2, 3, 139
- Turkel, H. R.: International Postal Congresses, x. 171-80
- Turkey and Iraq, Frontier between, advisory opinion of the Permanent Court of International Justice as to, vii. 139, 203 et seq.
- Turkey, Nationality in mandated territories detached from (N. Bentwich), vii. 97-109
- , Disappearance of capitulations in, v. 192
- Turkish and Greek populations, exchange of, advisory opinion of the Permanent Court of International Justice as to, vi. 198
- Turner, Mary Ann*, case of, ix. 160
- Turner, Sir S.: Extraterritoriality in China, x. 56-64
- Turner v. Thompson*, case of, ix. 170
- Turul*, case of the, iii. 65 n.
- Twee Gebroeders*, case of the, ii. 67 n.
- Twende Brodre*, case of the, viii. 68
- Two Marias*, case of the, viii. 77 n.
- Tyau, M. T. Z.: Extraterritoriality in China and the question of its abolition, ii. 133-49
- Tyler v. The People*, case of, vi. 47 n., 53 n.
- Udny v. Udny*, case of, iv. 67
- Ullee, In re*, case of, ix. 172
- Union of Soviet Socialist Republics v. Belarew*, case of, vii. 213, 221
- Union of Soviet Socialist Republics v. Onow*, case of, vii. 213, 221
- United States, British-American Pecuniary Claims Commission, ii. 193-200
- — Constitution and rights of private property, ix. 22, 23
- —, Liquor Treaty between British Empire and, v. 187
- —, new legislation in, as to acquisition and loss of nationality by marriage (Professor J. W. Garner), iv. 169-72
- — and Norway, arbitration between, iv. 159; x. 40
- — and the Permanent Court of International Justice, x. 210
- United States, Prohibition Law, applicability of, to foreign ships entering American ports (J. A. Barratt), v. 184
- —, return of alien enemy property by the (Professor J. W. Garner), ix. 129
- — and Reparation Commission, Arbitration between, viii. 156; x. 45
- — Supreme Court, recent decisions of, involving questions of international law (Professor J. W. Garner), viii. 202
- United States v. Davis*, case of, vi. 53 n., 54 n.; viii. 115 n., 118, 119, 120, 121, 128
- United States v. Dickelman*, case of, ix. 38 n.
- United States v. McRae*, case of, v. 87; ix. 191
- United States v. Milwaukee Co.*, case of, viii. 178
- United States v. P. W. Smith*, case of, x. 69 n.
- United States v. Prioleau*, case of, v. 87; ix. 191
- United States v. Rio Grande Dam and Irrigation Co.*, case of, x. 152
- Uruguayan Insurance monopoly case, ix. 4
- Utile*, case of the, i. 55 n.
- Utrecht, Treaty of, Neutral commerce in the war of the Spanish Succession and the (G. N. Clark), ix. 69-83
- Valeria*, case of the, i. 279; ii. 67 n., 201
- Value of the Right of Capture at sea in time of war (Vice-Ad. Sir H. Richmond), ix. 50-8
- Veniera*, case of the, viii. 63 n.
- Vatican, The State of the City of the (Professor A. Pearce Higgins), x. 214
- Venus*, case of the, iv. 69
- Verlengo v. The Treasury*, case of, v. 175
- Vesta*, case of the, ii. 203; iv. 51
- Victoria*, case of the, iii. 76 n.
- Vier Gebroeders*, case of the, viii. 69, 72, 73
- Village of Euclid v. Ambler Realty Co.*, case of, ix. 24; x. 52, 53 n.
- Visit, Search, and Detention (Professor A. Pearce Higgins), vii. 43-53
- Visser, in re, H.M. The Queen of Holland v. Drukker and others*, case of, x. 246, 252
- Vlasto v. Russo-Asiatic Bank*, case of, v. 83 n.
- Wade, T. C.: The Roll *De Superioritate Maris Angliae*, ii. 99-108
- Walker v. Baird*, case of, iii. 24 n.
- Walson v. Bonfils*, case of, viii. 175

- War of the Spanish Succession, Neutral Commerce in the, and the Treaty of Utrecht (G. N. Clark), ix. 69-83
- War, British Prize Courts and the (Sir H. Erle Richards), i. 1-34
- , The effect of, on treaties (Sir Cecil J. B. Hurst), ii. 37-47
- Warfare, Retaliation in Naval (Professor A. Pearce Higgins), viii. 129-46
- Washington*, case of the, iii. 53
- Washington Conference (1921-22), The (H. W. Malkin), iii. 179
- , Submarines at the (R. F. Roxburgh), iii. 151-8
- Weber*, *ex parte*, case of, i. 174; viii. 49 n., 57 n.
- Weiss Biheller & Brooks, Ltd. v. The German Government*, case of, iv. 180
- West, F. R.*, case of, ix. 163
- West Rand Gold Mining Co. v. The Queen*, case of, v. 173; vi. 25 n.; x. 68 n.
- What is the League of Nations? (P. E. Corbett), v. 119-48
- White Slave Traffic, International Conference on, 1921, ii. 175
- White Todd, In re estate of*, case of, viii. 189, 198
- Whittuck, E. A., obituary notice of, v. 1
- Whose is the Bed of the Sea? (Sir Cecil J. B. Hurst), iv. 34-43
- Wildenhuis*, case of, i. 53, 59, 64
- Wilhelmina*, case of the, iv. 89, 185
- Wilkins v. Lagards et Procureur de la République près le Tribunal de Papeete*, case of, x. 94 n.
- William*, case of the, viii. 78, 79
- William A. Parker*, case of, viii. 183
- William Hardman* case, arbitration, vii. 118
- Williams, Sir John Fischer: Denationalization, viii. 45-61
- , —: International law and the property of Aliens, ix. 1-30
- Williams, Sir John Fischer: Pan-American and League of Nations Treaties of Arbitration and Conciliation, x. 14-31
- , —: Sovereignty, Seisin and the League, vii. 24-42
- Wimbledon*, case of the, v. 11 n., 204; vi. 115; vii. 136
- Windhuk in South-West Africa (State Succession)*, case, x. 93 n.
- Winfield, P. H.: Grounds of intervention in international law, v. 149-62
- , —: The History of Intervention in International Law, iii. 130-49
- Women and Children, Traffic in, Conference on, 1921, ii. 175
- Workmen's compensation for accidents, draft convention concerning, vii. 195
- — for accidents, draft convention concerning equality of treatment for national and foreign workers in regard to, vii. 196
- — for occupational diseases, draft convention concerning, vii. 195
- Worms v. de Valdor*, case of, ix. 185
- Württemberg, Dispute with Baden as to use of upper waters of the Danube, x. 149
- Yong Vrow Adriana*, case of the, viii. 65, 75 n.
- Yonge Klassina*, case of the, iv. 65, 72
- Youmans* case, viii. 184
- Yuille, Shortridge Company* case, x. 183 n.
- Zafiro* claim before Anglo-American Pecuniary Claims Commission, vii. 205 et seq.
- Zamora*, case of the, i. 13, 30 n., 170; ii. 201; iii. 73, 115; vii. 47 n., 214; viii. 15, 133 n., 135; ix. 64
- Zelden Rust*, case of the, viii. 70
- Zora*, case of the, ii. 181 n., 192 n.

